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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 265

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

THE POTTSVILLE BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 5, 1939

CERTIORARI GRANTED OCTOBER 9, 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. —

FEDERAL COMMUNICATIONS COMMISSION AND SCHUYLKILL BROADCASTING COMPANY, INTERVENOR, PETITIONERS

vs.

THE POTTSVILLE BROADCASTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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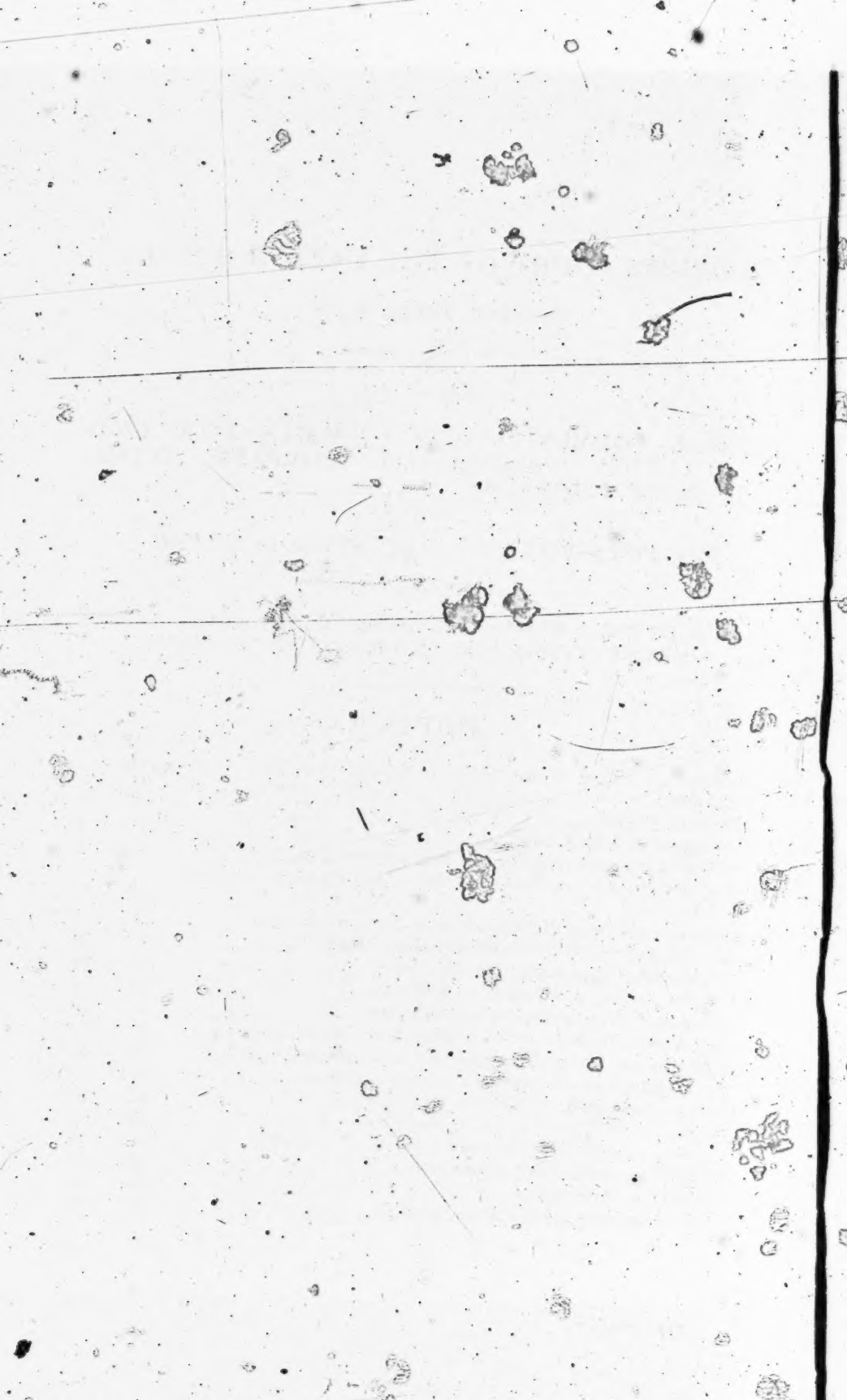

1 In United States Court of Appeals for the District of Columbia

No. 7016

THE POTTSVILLE BROADCASTING COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION; SCHUYLKILL BROADCASTING COMPANY, INTERVENER, APPELLEES

Appeal from the Federal Communications Commission

(Argued March 7, 1938. Decided May 9, 1938)

Eliot C. Lovett and Charles D. Drayton, both of Washington, D. C., for appellant.

Hampson Gary, General Counsel, George B. Porter, Assistant General Counsel, Fanney Neyman, Assistant Counsel, and Frank U. Fletcher, all of Washington, D. C., for Federal Communications Commission; and Arthur W. Scharfeld, Philip G. Loucks, and Joseph F. Zias, all of Washington, D. C., for Schuylkill Broadcasting Company.

Before GRONER, MILLER, and EDGERTON, JJ.

Opinion

GRONER, J.: This is an appeal from the Federal Communications Commission.

The Pottsville Broadcasting Company, a newly organized Maryland corporation, applied to the Commission in May 1936 for a permit to construct a local daytime broadcasting station in Pottsville, Pennsylvania. Charles D. Drayton, a lawyer in Washington city, is president of the company. The other officers and directors are residents of Pottsville. Prior to the application the company organized and received subscriptions at $10 each for 2,625 shares of its capital stock. Drayton subscribed to 2,550 shares in the amount of $25,500. The remaining shares were distributed among the other officers and directors. There is no question as to the financial ability of all to comply with their several obligations.

The application was submitted by the Commission in the usual course to one of its examiners, who in November 1936 recommended that the application be granted. The examiner's findings of fact were that the corporation was in all respects financially qualified to operate the proposed station; that there was need of a local daytime station at Pottsville; that its establishment would not result in objectionable interference; and that the program of entertainment, etc., appeared to be wholly satisfactory.

Some five months later, the Commission overruled the examiner's recommendation. The Commission found that there was need of a local station in Pottsville, sufficient financial patronage reasonably to assure its success, and sufficient local talent to support its
2 service. But the Commission said it appeared from Drayton's testimony before the examiner that the payment of the corporate stock subscriptions was contingent upon the obtaining of an order of the Pennsylvania Securities Commission authorizing the issuance of the stock, and the Commission held that this contingency defeated any finding of financial ability in the applicant. In addition to this ground for denial of the license, the Commission said that the principal stockholder, Drayton, was not a resident of Pottsville, "had no definite plans for residing in that town, or spending a percentage of his time therein," and was not familiar with the needs of the listening audience in that region. The Commission also observed that the record established that "Drayton's interest in the proposed station was primarily for investment purposes."

The applicant appealed to this court under the provisions of Section 402 (b) (1) of the Act (47 U. S. C. A. 402 (b) (1)). The appeal is based on the alleged error of the Commission in assuming as a matter of law that the consent of the Pennsylvania Commission was essential to the validity of the proposed stock issue, and likewise on the alleged error of the Commission in holding that an applicant for a local station must be a resident of the community intended to be served and must be personally familiar with the local needs.

The Commission answers the first point with the statement that the finding as to the financial status of the company was based upon the testimony of Mr. Drayton himself and that the Commission was justified in accepting it as correct. The testimony of Drayton to which the Commission refers is:—"My own subscription consists of 2,550 shares at the total amount of $25,500. This amount will be paid in immediately, if, and when, the present application is granted and the requisite order secured from the Pennsylvania Securities Commission. A similar situation exists as to the other subscribers." But as to this Drayton now says he was mistaken in his assumption that the subscription was not binding without the approval of the Pennsylvania Securities Commission and insists the Commission ought to have examined for itself the laws of Pennsylvania before making its conclusion based on such laws.

We have said on the subject that the applicant for a station permit assumes the responsibility of showing proper financial responsibility in order that the Commission may determine whether the grant of the license would be in the public interest, and we have no intention of modifying our position. But in the case now under consideration the evidence shows that the corporation was organized in Maryland and subscriptions to its stock in excess of its financial requirements for construction of the station were duly made. Undoubtedly those subscriptions were binding and lawful. Except, therefore, for the

incorrect supposition of Drayton that the consent of the Pennsylvania Commission was a condition precedent to the issuance and payment of the stock, it is obvious that the Commission would not have grounded its refusal to make the grant on the basis of financial inability. We say incorrect supposition because it is undoubtedly true, as the Commission in effect now concedes, that the validity of the stock subscriptions was in no respect dependent upon any action by the Pennsylvania Commission. In this view, it is obvious that
3 there was a mutual mistake, but one as to which the applicant no less than the Commission acted wholly in good faith. The Pennsylvania Act is intended to regulate the registration of stock and bond dealers and salesmen, and not to regulate the issuance of stock in circumstances like those present here. This clearly appears from the Act itself as well as from its interpretation by the Supreme Court of Pennsylvania. Insuranshares Corp. v. Pennsylvania Securities Commission, 298 Pa. 263, 148 Atl. 107; Commonwealth v. Pastor, 289 Pa. 22, 136 Atl. 862; Bagley v. Cameron, 282 Pa. 84, 127 Atl. 311. It may be, as the Commission insists, that there is no obligation on it to enter into an independent investigation of the requirements of the Pennsylvania Securities Act or to take notice of the statutes of one of the States and hence that the Commission is entitled to accept as true the evidence of the chief officer of the applicant in this respect; but we need not consider that question. If, as we think, both Mr. Drayton in his testimony and the Commission in its finding based on his testimony were in error, it would be a silly business to perpetuate the error and permit it to destroy the rights of the applicant in the instant controversy.

In that view, we are led to consider the other ground on which the Commission based its denial of the permit. This is, as we have seen, that Drayton is not a resident of Pottsville, is not familiar with its local broadcasting needs, and is interested in the proposed grant primarily for investment purposes. The Commission said:

"It is the opinion of the Commission that those who will control the policies of proposed new "local" broadcast stations should show themselves to be acquainted with the needs of the area proposed to be served and to be prepared to meet that need."

The evidence taken before the examiner shows that Drayton, who organized the corporation and subscribed for all but a nominal amount of the stock, was, until just prior to the organization of the applicant corporation, a stranger to Pottsville; that he determined to apply for a license to operate a broadcasting station there largely as a sound business investment; and that he associated with him and brought into the new corporation a number of the leading citizens of that town in order to effectuate his purpose. One of the directors is the manager of the largest department store in Pottsville. Another is associated with the technical staff of the Bell Telephone Company of Pennsylvania. All are men of prominence, standing, and character in the community. It is quite true that their interests for the time being are more or less nominal, but Drayton testified that in associat-

ing them with himself in the new enterprise he anticipated and hoped that their financial interest would increase with the station's growth and expansion. There is nothing in the record to suggest that they are mere dummy directors. Their own evidence indicates the contrary and at least for the period of their services as directors they would have the same individual responsibility as Drayton in the conduct of the corporation's business. They at least, if anybody, know the local requirements.

This particular ground of refusal has never been presented to us before, but we know from the published reports of the Commission's decisions that on the question of the propriety of confining grants of a local nature to local people the Commission has not given any indication of the adoption of a fixed and definite policy. If the contrary of this were true, we should be slow to say that the establishment of such a policy would be either arbitrary or capricious. But the policy should be applied with substantial uniformity, and the lack of that uniformity in the past convinces us that the Commission has not sought to lay down a hard and fast rule. As applied here, this ground of refusal was obviously secondary rather than primary. It perhaps would not have influenced the Commission to the point of denying the license, except for what the Commission viewed as the lack of financial ability on the part of the applicant. Considering the record as a whole, and in view of the obvious good faith of the applicant and the subscribers to its stock, of the conclusion of the Commission that the establishment of the station is desirable and in the public interest, and of the manifest error which the applicant led the Commission into making, we think the interests of justice require that the case be sent back to the Commission solely that it may reconsider it. If the Commissison should be of opinion, upon reconsideration, that the application ought not to be granted because a stranger to Pottsville has the controlling financial interest in the applicant corporation, and should announce a policy with relation to the grant of local station licenses, confining them to local people, we should not suggest the substitution of another view. But in saying this we are not unmindful of the obvious fact that such a rule might seriously hamper the development of backward and outlying areas. We never have assumed, however, and do not intend now to assume, such supervisory control of questions of policy. We think it perfectly clear it is the intent of the statute that such matters should be left wholly in the hands of the Commission, and our remand in this case should be understood only as growing out of the feeling on our part that the controlling consideration in the Commission's disposition of this case was its erroneous view of the Pennsylvania law and that to perpetuate this error would be wrong.

The order of the Commission is, therefore, reversed at appellant's cost and the case remanded for reconsideration in accordance with the views expressed herein.

Reversed and remanded.

5 In United States Court of Appeals for District of Columbia

No. 7016. April Term, 1938

THE POTTSVILLE BROADCASTING COMPANY, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION; SCHUYLKILL BROADCASTING COMPANY, INTERVENER

Judgment

May 9, 1938

Appeal from the Federal Communications Commission

This cause came on to be heard on the transcript of the record from the Federal Communications Commission and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of the said Federal Communications Commission in this cause, be and the same is hereby, reversed at appellant's cost, and that this cause be and the same is hereby remanded to the said Federal Communications Commission for reconsideration in accordance with the views expressed in the opinion of this court.

Per Mr. Chief Justice GRONER.

MAY 9, 1938.

Mr. Justice Stephens took no part in the consideration or decision of this case.

6 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Petition for writ of prohibition and for writ of mandamus

Filed July 2, 1938

To the Honorable The Chief Justice and Associate Justices of the United States Court of Appeals for the District of Columbia:

Your petitioner, the Pottsville Broadcasting Company, respectfully alleges:

I

In May 1936, your petitioner filed with the respondent, Federal Communications Commission, an application for a permit to construct a radio broadcasting station to operate daytime only in Pottsville, Pennsylvania. After full proceedings before and consideration by the

Commission upon and of all issues raised to enable a determination as to whether the granting of the application would serve the public interest, convenience, and necessity as required by the Communications Act, the Commission denied the application on the ground that, as a matter of law, the consent of the Pennsylvania Securities Commission was essential to the validity of the applicant's proposed stock issue but had not been obtained, thus disqualifying the applicant financially, and also that the majority stockholder of a corporate applicant for a "local" station must be a resident of the community intended to be served and must be familiar with the local needs, whereas in this case the majority stockholder was a nonresident and not personally familiar with local requirements, although the board of directors was clearly shown, as later found by this Court, to
7 "know the local requirements."

Thereupon, your petitioner took and prosecuted an appeal to this Court to reverse the said decision, and such proceedings were had on appeal that afterwards, on May 9, 1938, this Court rendered its judgment reversing the decision of the Commission. On May 27, 1938, this Court sent a certified copy of its judgment to the Commission and remanded the case for reconsideration in accordance with the views expressed in the opinion. It did not send it back for unrestricted reconsideration, the enlargement of the record, the inclusion of other parties, or the broadening of the issues. On the contrary this Court held that the Commission erred, as a matter of law, in assuming that the consent of the Pennsylvania Securities Commission was necessary to enable your petitioner to issue its subscribed stock, and thus eliminated any question of petitioner's financial ability, which, in the view of this Court, constituted the primary ground for the Commission's denial of the application. The sole reason for remanding the case was to enable the Commission to reconsider the secondary ground for its denial of the application, namely, as to whether the Commission might deem it in the public interest to announce a policy for uniform application "with relation to the grant of local station licenses, confining them to local people."

II

On May 23, 1938, your petitioner filed with the Commission a petition for the granting of its application. It pointed out that the Commission had adopted no policy requiring a majority stockholder of an applicant corporation to be personally familiar with the needs of the area to be served, or to be a resident thereof. Furthermore, it was shown that petitioner's proposed station, according to the Commission's own rules and tested by the extent of the area to be served, is not a "local" but a "regional" station.[1] Therefore, the

[1] The petition, which was duly verified, contained the following paragraphs (pp. 11–12):
"This application seeks a license to operate on 580 kilocycles with 250 watts power. Under the regulations of the Commission now in force that is designated as a 'regional' frequency and is allocated for use by regional stations. The operating power of such a station shall not be less than 250 watts, but during the daytime may be as much as 5,000 watts. (Rule 120.)
"The frequencies designated by the Commission's regulations as local frequencies and allocated for use by local stations, with a power of 100 watts during nighttime and not to

8 Commission's pronouncement, quoted in the opinion of this Court, that "those who will control the policies of proposed new 'local' broadcast stations should show themselves to be acquainted with the needs of the area to be served and to be prepared to meet that need" was inadvertent, and tended to mislead the Court, since it has no application to this case.

III

On May 13, 1938, a petition was filed with the Commission by the Pottsville News and Radio Corporation requesting that the Commission schedule oral argument upon its application and also upon that of your petitioner and of the Schuylkill Broadcasting Corporation, all three of which request identical facilities in Pottsville.

9 The Pottsville News and Radio Corporation did not file its application until more than six months after the filing of the Pottsville Broadcasting Company's application and more than one month after the Examiner's Report was released recommending the granting thereof. The Schuylkill Broadcasting Corporation did not file its application until twelve weeks after the Pottsville Broadcasting Company's application was filed, and six weeks after it was designated for hearing. Your petitioner filed an answer in opposition to the said petition of the Pottsville News and Radio Corporation challenging the jurisdiction of the Commission to proceed as requested and pointing out that "the uniform, consistent, and impartial administration of the Communications Act, as well as adherence to the decision of the Court of Appeals herein," required the denial of the petition and the granting of the application of the Pottsville Broadcasting Company. Among other things, your petitioner called attention to the fact that as late as April 20, 1938, the Commission granted an application (Northwestern Publishing Company, Docket No. 4177, for a permit to construct a new local-channel station to operate daytime only in Danville, Illinois) wherein the applicant was entirely owned by a foreign corporation of which the President and majority stockholder was a nonresident, and where there was no showing made that he was familiar with the needs of the area to be served.

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exceed 250 watts during daytime, are as follows: 1200, 1210, 1310, 1370, 1420, and 1500 kilocycles. (Rule 121.)

"The authority of the Commission to classify radio stations, to prescribe the nature of the service to be rendered by each class of licensed stations, and to assign frequencies to the various classes of stations, is specifically granted by the provisions of Section 303 of the Federal Communications Act. Accordingly the orders of the Commission issued under this authority have the force and effect of law. Therefore, under existing law, the proposed station at Pottsville cannot be classified as a 'local' station, but is a 'regional' station.

"Moreover, from a practical viewpoint, and as shown by the record, the proposed station may not properly be considered merely a 'local' station. The testimony shows that it is intended to serve, not merely Pottsville, but all of Schuylkill County, with more than 236,000 persons, a large part of Berks and Lebanon Counties, considerable portions of Northumberland, Carbon, and Dauphin Counties, and small parts of several other counties, containing in all a population of approximately 865,000, of which more than 391,000 are in urban centers. Within the 10 millivolt per meter contour of the proposed station there are more than 67,000 persons, while the 2 millivolt contour includes approximately 236,000 and the 0.5 millivolt contour more than 865,000. (R. 50, Exhibit 9.)

"In its opinion herein the Commission treated the application as having to do with a proposed 'local' station, but, as shown, both the frequency to be used and the territory and population to be served are regional, not local."

Your petitioner also called attention to the fact that its case was remanded, not for unrestricted reconsideration, but for reconsideration solely upon the question of Commission policy as to whether the application should be denied, to use the language of this Court, "because a stranger to Pottsville has the controlling financial interest in the applicant corporation."

IV

On June 9, 1938, the Commission, with full knowledge of this Court's instructions but in disregard thereof, entered the following order, as shown by its Minute No. 251–38:

"The Commission (1) denied without prejudice the petition of Pottsville Broadcasting Company for grant of its application for construction permit, Docket No. 4071; (2) granted the petition of Pottsville News and Radio Corporation for oral argument on the application of Pottsville Broadcasting Company, Docket No. 4071, Pottsville News and Radio Corporation, Docket No. 4402, and Schuylkill Broadcasting Company, Docket No. 4176; and (3) directed that thereafter the Commission consider these applications not in a consolidated proceeding, but, individually on a *comparative basis*, the application which in the judgment of the Commission will best serve public interest to be granted." [Italics supplied.]

On June 11, 1938, the Commission addressed letters to the three applicants above mentioned advising them that The Pottsville Broadcasting Company's petition had been denied and that of the Pottsville News and Radio Corporation granted, and stating that September 17, 1938, had been fixed as the date for an oral argument upon all three applications. This date was later changed to September 15, 1938.

On June 17, 1938, the Commission was requested, on behalf of The Pottsville Broadcasting Company, to indicate the scope of the argument to be held upon each of the aforesaid applications. The following questions were specifically asked:

"Is each [application] to be argued upon the entire record therein and the report thereon? Or is argument to be limited to the question as to whether a corporate applicant for a regional frequency should be disqualified from receiving a grant by virtue of the nonresidence of its majority stockholder, or by reason of the fact that such stockholder is not personally familiar with the needs of the area to be served?"

Under date of June 25, 1938, the Commission, by its Secretary, replied that "the Commission expects to allow each party full latitude, within the record, in the matter of presenting oral argument upon these dockets."

V

The Commission intends to enter upon an unrestricted reconsideration of the application of your petitioner contemporaneously and on a comparative basis with others subsequently filed, necessarily

bringing in other parties and broadening the issues in the record submitted to this Court. No justification for such procedure is to be found in the decision of this Court, and if the same be countenanced it will make a mockery of the power explicitly vested in this Court to review orders of the Commission.

11

VI

The Commission has announced no policy, such as might be permitted by the decision of this Court, which would disqualify your petitioner from receiving the instrument of authorization for which it has applied. In fact, the Commission has shown that it intends to continue its contrary policy, heretofore announced in numerous decisions of sanctioning the control of applicant corporations by nonresidents who are not personally familiar with the needs of the area to be served. Thus, on May 25, 1938, more than two weeks after this Court rendered its decision herein, the Commission, "In the matter of Arthur Lucas" (Docket No. 4563), granted a permit for a new broadcast station at Savannah, Georgia, to an individual who was not a resident of that community, and who was not shown to be familiar with the needs of the area to be served. The proposed station is to operate on a local frequency.

VII

The failure of the Commission to announce a policy, for uniform application, that the lack of personal familiarity with the needs of the area on the part of a majority stockholder disqualifies a corporation from receiving an instrument of authorization under the Communications Act, the obvious intention to continue its former policy to the contrary, and, in fact, the actual continuance of such contrary policy since the decision of the Court herein, leave the Commission no legal right to deny the application of your petitioner, The Pottsville Broadcasting Company. That Company has been found to be otherwise qualified in all respects, as shown by the decision of the Commission and of this Court, and the public need for the station has also been determined. There is nothing further which the Commission may lawfully do prior to granting petitioner's application.

VIII

Your petitioner alleges that the Commission has refused and still refuses to proceed in accordance with the decision of this Court reversing the Commission upon the primary question of your
12 petitioner's financial ability and remanding the cause for reconsideration upon the secondary and sole remaining question of Commission policy as to whether the application should be denied because the controlling financial interest in the applicant corporation is held by a nonresident of Pottsville.

IX

Your petitioner alleges that the Commission has refused and still refuses either to grant or deny petitioner's application upon the facts contained in the record submitted to this Court and upon which the decision of this Court was based.

X

Your petitioner alleges that the Commission has disregarded and intends to continue to disregard the facts of record and to base its decision upon facts embodied in the records before it on other applications assigned for argument on the same day and to be considered on a comparative basis, and also to disregard the law of this case as adjudicated by this Court, and is attempting to evade the jurisdiction of this Court.

XI

Your petitioner alleges that the Commission has indicated its intention to proceed, and will so proceed before this Court convenes in October, in a manner contrary to the decision of this Court and entirely without the Commission's jurisdiction under that decision.

XII

In support of its petition, your petitioner refers to the printed record in this case and to copies thereof on file in this Court, and prays that this Court refer to the same and to the decision herein.

XIII

Your petitioner alleges that the prosecution of its application before the Federal Communications Commission and the necessity
13 for prosecuting an appeal to this Honorable Court have already entailed a considerable expenditure of time and money, and if now the Commission shall be permitted to evade the mandate of this Court and indulge in dilatory tactics, such as it has plainly manifested its intention of doing by assigning this case for unrestricted reconsideration on a comparative basis with other subsequently filed applications, petitioner will suffer irreparable injury thereby.

XIV

Your petitioner avers that the aforesaid order of the Commission and its threatened action thereunder are in violation of the Federal Communications Act and in excess of the Commission's jurisdiction thereunder, and also in violation of the legal rights of petitioner under the decision of this Court. Petitioner has no adequate remedy whatsoever except by writs of prohibition and mandamus.

Wherefore, the premises considered, your petitioner prays:

1. For a writ of prohibition to be issued from this Honorable Court directed to the Federal Communications Commission and the

members thereof, prohibiting them (a) from hearing argument or reargument in this case except on the one question of policy as to which the case was remanded for reconsideration by the Commission; (b) from considering the application of petitioner on a comparative basis with other applications subsequently filed and which constitute no part of the record considered by this court; (c) from hearing argument upon or deciding the application of the Pottsville News and Radio Corporation or that of the Schuylkill Broadcasting Company until such time as the Commission shall have complied with the judgment of this Court; and (d) from taking any other procedural steps or from exercising jurisdiction herein other than as contemplated in the judgment of this Court reversing the Commission;

2. For a rule directed to the Federal Communications Commission and the members thereof to show cause why the writ of prohibition as herein prayed shall not issue;

3. For a writ of mandamus to be issued from this Honorable
14 Court directed to the Federal Communications Commission and the members thereof commanding them (a) to render a decision in this case within a time certain, to be fixed by this Court, and in conformity with the judgment heretofore rendered by this Court; (b) to base the decision on the one question of policy as to which the case was remanded for reconsideration by the Commission; and (c) to grant the application of your petitioner on this record, as submitted to and considered by this Court;

4. For a rule directed to the Federal Communications Commission and the members thereof to show cause why the writ of mandamus as herein prayed shall not issue; and

5. For such other and further relief as may be appropriate in the premises.

Respectfully submitted.

THE POTTSVILLE BROADCASTING COMPANY,
By ELIOT C. LOVETT,
CHARLES D. DRAYTON,
Attorneys for Petitioner.

[Duly sworn to by Charles D. Drayton; jurat omitted in printing.]

15 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Opposition of Federal Communications Commission to the petition of the Pottsville Broadcasting Company for a rule to show cause why a writ of prohibition and a writ of mandamus shall not issue

(Filed July 12, 1938)

Now comes the Federal Communications Commission by its counsel and, while expressly reserving and saving to itself the right to make full and complete return or otherwise plead to said rule should it

issue, opposes the issuance of a rule against the Federal Communications Commisssion to show cause why a writ of prohibition and a writ of mandamus should not issue in the above-entitled matter and, as grounds for such opposition, respectfully shows the Court:

1. That prohibition or mandamus may not be invoked against the Commission if the Commission acts in conformity with the mandate of this Court;

2. That the Commission is acting within the mandate of this Court;

3. That prohibition or mandamus may not be invoked against the Commission to restrain it from exercising regulatory power conferred by law or to circumscribe its discretion;

4. That the petitioner has a plain, speedy, and adequate remedy at law;

5. That petitioner's application has not been denied, and it cannet be assumed that said application will be denied.

16 Wherefore, the Federal Communications Commission prays that this Court deny the Pottsville Broadcasting Company a Rule to Show Cause in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
By HAMPSON GARY,
General Counsel.
WM. H. BAUER,
Acting Assistant General Counsel.
ANDREW G. HALEY,
Assistant Counsel.

17 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Opposition of Schuylkill Broadcasting Company to the petition of the Pottsville Broadcasting Company for the issuance of writs of Prohibition and Mandamus to the Federal Communications Commission

Filed July 25, 1938

Now comes Schuylkill Broadcasting Company, intervener in the proceedings before this Court on the appeal in this cause (No. 7016), entitled the Pottsville Broadcasting Company, appellant v. Federal Communications Commission; Schuykill Broadcasting Company, intervener, and opposes the issuance of writs of prohibition and mandamus to the Federal Communications Commission in the above-entitled matter and, as grounds for such opposition, respectfully shows the Court the following:

The petitioner in the above-entitled matter, The Pottsville Broadcasting Company, prays for, among other things, a writ of prohi-

bition to be directed to the Federal Communications Commission, prohibiting them from considering the application of petitioner on a comparative basis with the application of the Schuylkill Broadcasting Company and for a writ of mandamus commanding the Commission to grant the application of petitioner upon an independent reconsideration of its application without considering the application of the Schuylkill Broadcasting Company.

A chronological review of the proceedings surrounding the prosecution of the two applications clearly shows that they are not only contemporaneous and mutually exclusive, but that they should be considered on a comparative basis on the merits in order to determine which would better serve the public interest, convenience, and necessity.

18 On August 12, 1936, the Commission issued its Notice of hearing, dated August 12, 1936, designating the application of the Pottsville Broadcasting Company (Commission Docket No. 4071) for hearing to be held on September 30, 1936.

Prior to the issuance of the Commission's Notice of Hearing on the Pottsville Broadcasting Company application, and on August 10, 1936, the Schuylkill Broadcasting Company filed its application (File No. B2–P–1298; Commission Docket No. 4176) for a new broadcasting station to be located at Pottsville, Pennsylvania, on the frequency 580 kilocycles, the same assignment requested by the Pottsville Broadcasting Company.

On August 31, 1936, the Schuylkill Broadcasting Company, pursuant to Rule 105.20 of the Commission's Rules and Regulations, filed with the Commission a petition to intervene in the proceedings to be had on the application of the Pottsville Broadcasting Company, alleging that it had a substantial interest in the subject matter of the hearing in that the two applications are in direct conflict and the granting of the one would preclude the granting of the other. On September 8, 1936, the Commission, Broadcast Division, granted said petition to intervene and be made a party to the hearing on the application of the Pottsville Broadcasting Company, thus recognizing that said petition disclosed a substantial interest in the subject matter of the hearing within the meaning of and as required by Rule 105.20 of the Rules and Regulations.

Approximately one month prior to the hearing on the application of the Pottsville Broadcasting Company, and on September 3, 1936, Counsel for Schuylkill Broadcasting Company addressed the following communication to the Commission, requesting that the Commission designate the application of the Schuylkill Broadcasting Company for hearing on the same date previously designated for the application of the Pottsville Broadcasting Company, namely, September 30, 1936:

19 "SEPTEMBER 3, 1936.

"FEDERAL COMMUNICATIONS COMMISSION,
"*Washington, D. C.*

"In re: Application of Schuylkill Broadcasting Company, File No. B2-P-1298

"GENTLEMEN: The Schuylkill Broadcasting Company hereby respectfully requests that its application for authority to construct a new broadcast station at Pottsville, Pennsylvania, to operate on 580 kilocycles, with 250 watts power, during daytime hours, filed with the Commission on August 10, 1936, and bearing file nuumber B2-P-1298, be designated for hearing on September 30, 1936.

"There is now pending before the Commission an application of the Pottsville Broadcasting Company for a new station at Pottsville, Pennsylvania, involving the identical assignment, which has been designated for hearing on September 30, 1936 (File No. B2-P-1154. Docket No. 4071). Notice of the hearing upon this application was sent to all parties on August 12, 1936.

"These applications are in direct conflict and the granting of one would preclude the granting of the other. Therefore, on August 31, 1936, the Schuylkill Broadcasting Company filed with the Commission a petition to intervene in the proceedings to be had in the matter of the application of the Pottsville Broadcasting Company.

"Since the two applications are for the same frequency assignment; the issues in each are substantially identical; and the same parties are involved in both; it is believed that considerable time and expense will be conserved by holding hearings on both applications on the same date. Furthermore, the interests of none of the parties involved would be adversely affected in the event the Commission designates both applications to be heard upon the same date.

"It is therefore requested that the Commission designate the application of the Schuylkill Broadcasting Company for hearing on the same date heretofore fixed for the application of the Pottsville Broadcasting Company, namely September 30, 1936.

"The undersigned has consulted Mr. Elliott Lovett, counsel
20 for the Pottsville Broadcasting Company, and he has stated that he has no objection to both applications being heard on the same date.

"LOUCKS & SCHARFELD,
"*Attorneys for the Schuylkill Broadcasting Company,*
"By PHILIP G. LOUCKS."

Despite the request of the Schuylkill Broadcasting Company to have its application heard on the same date as that fixed for the Pottsville Broadcasting Company, the application was not designated for hearing with that of the Pottsville Broadcasting Company.

The application of the Pottsville Broadcasting Company was heard on September 30, 1936, and the Schuylkill Broadcasting Company,

having been permitted to intervene in said matter by the Commission, participated in the hearing. On November 5, 1936, the Commission released Examiner's Report No. I-305 on the application of the Pottsville Broadcasting Company.

On November 20, 1936, the Schuylkill Broadcasting Company filed its exceptions to the Examiner's Report on the Pottsville Broadcasting Company's application. In said exceptions, exception was particularly taken to the Examiner's denial of the motion of the Schuylkill Broadcasting Company, made during the hearing, for postponement of decision on the Pottsville Broadcasting Company application until such time as the application of the Schuylkill Broadcasting Company could be heard by the Commission and exception was also taken to the Examiner's failure to report the fact that such motion was made and denied during the hearing.

On May 4, 1937, the Commission entered its final order denying the application of the Pottsville Broadcasting Company, effective June 29, 1937, later extended to July 6, 1937.

21 Prior to the time that the Commission entered its final order denying said Pottsville Broadcasting Company application, and on April 12, 1937, a hearing was had on the application of the Schuylkill Broadcasting Company application, and the Commission made the Pottsville Broadcasting Company a party respondent to the proceedings.

On June 24, 1937, the Commission released Examiner's Report No. I-442, recommending that the application of the Schuylkill Broadcasting Company be granted.

On July 8, 1937, the Schuylkill Broadcasting Company requested oral argument in support of Examiner's Report I-442 and in opposition to the exceptions thereto. On July 9, 1937, the Pottsville Broadcasting also requested oral argument in connection with said Examiner's Report No. I-442.

On August 18, 1937, the Commission granted oral argument on Examiner's Report I-442, said oral Argument to be heard on November 4, 1937.

On July 26, 1937, the Pottsville Broadcasting Company sued out its appeal (No. 7016) in this Court from the Commission's decision, rendered July 6, 1937, denying its application.

On August 24, 1937, the Schuylkill Broadcasting Company filed its notice of intention to intervene and a verified statement of intervener's interest in the proceedings to be had before this Court, stating that the Schuylkill Broadcasting Company is a Pennsylvania corporation organized for the purpose of establishing and operating a broadcasting station and has its principal place of business at Pottsville, Pennsylvania; that it has pending before the Commission an application to establish a new radio broadcasting station at Pottsville, on the frequency 580 kilocycles, with 250 watts power, daytime hours of operation, which is the identical assignment sought by appellant, Pottsville Broadcasting Company; that the applica-

22 tion of the Schuylkill Broadcasting Company was pending at the time of the hearing upon appellant's application and by formal action of the Commission, the Schuylkill Broadcasting Company was permitted to participate and did participate in the hearing upon appellant's application; that subsequently, on April 12, 1937, a hearing was had upon the application of Schuylkill Broadcasting Company and thereafter on June 24, 1937, the Commission released the report of its Examiner, which report recommended that the application of the Schuylkill Broadcasting Company be granted; that the appellant, Pottsville Broadcasting Company, in its "Notice of Appeal" and "Statement of Reasons Therefor," prayed that the decision of the Commission denying its application be reversed with instructions that the application of the Pottsville Broadcasting Company be granted; and that the reversal of said decision as requested would preclude favorable action upon the application of the intervener, Schuylkill Broadcasting Company, and require denial of said application (R. 5).

The Schuylkill Broadcasting Company participated in said proceedings before this Court by filing its "Brief and Argument."

Subsequent to the taking of the aforesaid appeal by the Pottsville Broadcasting Company, the Commission continued oral argument on Examiner's Report No. I-442 on the application of the Schuylkill Broadcasting Company, scheduled for November 4, 1937, until further notice, pending decision by this Court of the Pottsville Broadcasting Company appeal.

On May 9, 1938, this Court rendered its decision in the aforesaid appeal (No. 7016), reversing and remanding the case.

On May 23, 1938, the Pottsville Broadcasting Company filed with the Commission a petition for a grant of its application, and on June 7, 1938, the Schuylkill Broadcasting Company filed its opposition to the Pottsville Broadcasting Company's petition and requested that the two applications be considered on a comparative basis
23 on the merits to determine which applicant would better serve the public interest.

On June 9, 1938, the Commission, as shown in its Minute No. 251-38, stated that it would consider these applications individually, but on a comparative basis and that the application would be granted which in the judgment of the Commission will best serve public interest. The applications have now been scheduled for oral argument on September 15, 1938.

It is apparent from the foregoing that the Schuylkill Broadcasting Company prosecuted its application with due diligence at all stages of the proceedings; that, prior to the time that the Pottsville Broadcasting Company application was originally heard, it requested that its application be designated for hearing on the same date scheduled for the application of the Pottsville Broadcasting Company (see supra P. 3-4); that, by formal action of the Commission, it was permitted to participate and did participate in the proceedings on the application of the Pottsville Broadcasting Company and that, by ac-

tion of the Commission, the Pottsville Broadcasting Company was made a party to the proceeding on the Schuylkill Broadcasting Company application; and that the Schuylkill Broadcasting Company objected to prior consideration of the application of Pottsville Broadcasting Company.

Under these circumstances, the Commission was required and is now required to consider the two applications on a comparative basis on the merits in order to determine which would better serve the public interest.

The Commission's failure to hear the two applications together and to withhold decision upon the application of the Pottsville Broadcasting Company until such time as it could have considered the two applications on a comparative basis (as it was requested to do) and the fact that the Commission rendered its decision on the application of the Pottsville Broadcasting Company prior to its consideration of the application of the Schuylkill Broadcasting Company, although resulting in the Pottsville Broadcasting Company's appeal and culminating in this Court's decision, neither preclude the Commission from now considering the two applications on a comparative basis nor operate to support the petitioner's position that its application be granted upon an independent reconsideration without considering the application of the Schuylkill Broadcasting Company.

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On the other hand, if, as the petitioner, Pottsville Broadcasting Company, urges in its petition, the Commission is now prohibited from considering the application of the petitioner on a comparative basis with the application of the Schuylkill Broadcasting Company and is commanded to grant the application of the Pottsville Broadcasting Company without a comparative consideration of the Schuylkill Broadcasting Company's application on the merits in order to determine which would better serve the public interest, the Schuylkill Broadcasting Company will not only be a "person aggrieved" within the meaning of this Court's opinion in Pittsburgh Radio Supply House et al., v. Federal Communications Commission (— App. D. C. —, decided May 23, 1938), but will be deprived of a full and fair hearing as provided by Sections 309 (a) and 409 (a) of the Communications Act of 1934, and denied due process of law.

An independent reconsideration and grant of the Pottsville Broadcasting Company application without considering the application of the Schuylkill Broadcasting Company application on the merits in conjunction therewith will obviously result in prejudice to the Schuylkill Broadcasting Company and render it a "person aggrieved" since the granting of the Pottsville Broadcasting Company's application will preclude the granting of the Schuylkill application. In Pittsburgh Radio Supply House, et al., v. Federal Communications Commission, supra, where a request had been made that two applications be considered together, this Court said:

25

"* * * we find that Head of the Lakes, though a party to the hearing before the Commission, at no time applied to have its

application given prior consideration or objected to prior consideration of Waterbury's application; and this leaves us with only the objection in that respect made by Pittsburgh.

"As to it, the record shows that it requested that Waterbury's application and its application for increased power be considered together. This request was in line with the Commission's Rule 106.4. If Pittsburgh's application had been for a lawful grant, and if it were shown that the Commission's prior consideration of Waterbury's application seriously prejudiced Pittsburgh, we would have a case in which we might say Pittsburgh had appealable interest as a 'person aggrieved,' notwithstanding the latitude which we have said should be permitted to the Commission in such matters. Pulitzer Publishing Co. v. Fed. Comm. Comm., 94 F. (2d) 249, 252. * * *"

It is to be noted, furthermore, that the application of the Schuylkill Broadcasting Company, although filed with the Commission prior to the hearing on the application of the Pottsville Broadcasting Company and heard by an Examiner prior to the Commission's decision on the Pottsville Broadcasting Company application, has not as yet been orally argued before the Commission nor has the Commission considered the Examiner's Report on and the record evidence in connection with said application.

Sections 309 (a) and 409 (a) of the Communications Act of 1934 contemplate and provide for a full and fair hearing on applications. With respect to oral arguments before the Commission, Section 409 (a) of the Communications Act provides that "In all cases heard by an examiner, the Commission shall hear oral argument on the request of either party." This provision is mandatory so that any party to a proceeding is entitled as a matter of right to present oral argument. Such oral argument before the Commission and
26 consideration of the Examiner's Report and record evidence by the Commission constitutes a vital part of a full and fair hearing.

The Schuylkill Broadcasting Company has requested oral argument upon its application. The Commission has set the application of the Pottsville Broadcasting Company and the application of the Schuylkill Broadcasting Company for oral argument on September 15, 1938, so that it can consider the applications on a comparative basis. If the Commission is now prohibited from considering said conflicting applications on a comparative basis on the merits and is commanded to grant the petitioner's application upon an independent reconsideration, as requested by the petitioner, the Schuylkill Broadcasting Company will be deprived of a full and fair hearing on its application. Such hearing as has been had upon the Schuylkill application would be nullified and any further proceeding on said application would be a futility.

Wherefore, the premises considered, the Schuylkill Broadcasting Company, respectfully prays that this Court deny the Pottsville

Broadcasting Company a Rule to Show Cause in this proceeding and dismiss its Petition for Writ of Prohibition and for Writ of Mandamus.

Respectfully submitted.

SCHUYLKILL BROADCASTING COMPANY.
By PHILIP G. LOUCKS,
ARTHUR W. SCHARFELD,
JOSEPH F. ZIAS,
Its Attorneys.

27 ACKNOWLEDGMENT OF SERVICE

Receipt of a true copy of the foregoing "Opposition of Schuylkill Broadcasting Company to the Petition of the Pottsville Broadcasting Company for the Issuance of Writs of Prohibition and Mandamus to the Federal Communications Commission" is acknowledged this 25 day of July 1938.

ELIOT C. LOVETT, per M. S.
Attorney for Petitioner,
The Pottsville Broadcasting Company.
JOHN B. REYNOLDS,
Federal Communications Commission, Respondent.
Assistant Secretary.

27-a In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Reply to opposition of Schuylkill Broadcasting Company to petition for writs of prohibition and mandamus

Filed July 26, 1938

The Schuylkill Broadcasting Company, intervener in the original proceedings before this Court on the appeal of The Pottsville Broadcasting Company, petitioner in this proceeding, opposes the issuance of writs of prohibition and mandamus as prayed for the reasons that (a) it, allegedly, prosecuted its application with diligence because it requested, though unsuccessfully, that its application be heard with that of The Pottsville Broadcasting Company and was later permitted to and did participate in the hearing upon the latter and objected to prior consideration thereof, (b) it will be a "person aggrieved" within the meaning of this Court's opinion in the Pittsburgh Radio Supply House case, and (c) it will be deprived of a full and fair hearing as provided by the Act and thereby denied due process of law.

Counsel for the Schuylkill Broadcasting Company contend that they have a "right" to have their application heard with that of The Pottsville Broadcasting Company and to have the Commission decide them on a comparative basis—a procedure which the Commission now proposes to follow unless prohibited by this Court. If this contention were sound it would open wide the doors for the admission of endless procedural difficulties which would be a needless burden upon the Commission and upon applicants, and would act as a threat to discourage the development of radio broadcasting through the medium of meritorious applications.

The Schuylkill Broadcasting Company bases its alleged "right" to have its application considered in connection with that of The Pottsville Broadcasting Company upon the mere fact that it filed in time to intervene in the proceedings upon the latter application. Any mention of the fact that the latter application was filed on May 19, 1936, and designated for hearing on July 2, 1936, more than six weeks later, is studiously avoided. This is doubtlessly due to the fact that these dates, together with the filing date—August 10, 1936—of the Schuylkill application, show that the only reason it was not heard at the same time as that of The Pottsville Broadcasting Company was due entirely to the laches of the Schuylkill Broadcasting Company, and that it alone is responsible for the situation in which it now finds itself.

The third application, that of the Pottsville News and Radio Corporation, for the same facilities at Pottsville was not filed until December 7, 1936, nearly four months after the filing of the Schuylkill application and more than five months after The Pottsville Broadcasting Company' application was designated for hearing. However, due to, or aided by, a postponement requested by Schuylkill, both of those late applications were heard at the same time. Obviously, therefore, consistent with the contention now so urgently made, any consideration which the Commission now gives to the application of the Schuylkill Broadcasting Company must at the same time be given to that of the Pottsville News and Radio Corporation. If there had been a fourth application filed for the same facilities, but only in time for the applicant to participate, by intervention, in the hearing upon the application immediately preceding, the last applicant would have just as much "right" to demand contemporaneous consideration of its application with the three which had preceded as has now the Schuylkill Broadcasting Company to make its demand. There would be no end. Each successive applicant would, so to speak, be "riding on the coat-tails" of its predecessor, and this might continue until the first applicant was exhausted by the delay, by the expense, or by both.

Happily, the Commission is bound by no rules which contemplate any such procedure. Rule No. 106.4 provides, in general, for the consideration of conflicting applications at the same time. However, this is done only "so far as practicable," and the Rule excepts "applications filed after any such application has been designated for hearing." The rule, in full, follows:

"In fixing dates for hearings the Commission will, *so far as practicable*, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, *excepting*, however, *applications filed after any such application has been designated for hearing*." [Italics supplied.]

Needless to say, this rule has the force and effect of law. The Commission apparently recognized that fact when it disregarded the Schuylkill request to hear its application with that of The Pottsville Broadcasting Company. The latter was designated for hearing more than five weeks before the former was filed, and it was actually filed more than six weeks before it was designated. The Rule specifically excepts from its operation applications filed at any time after the application in question has been designated for hearing. As we stated in our reply to the Commission's "Opposition" to our petition, such an exception is clearly in the interest of orderly procedure, and if it were not so provided the Commission might become involved with an endless procession of applications, each one of which would delay consideration of that which preceded it.

Counsel for the Schuylkill Broadcasting Company cite the decision of this Court in Pittsburgh Radio Supply House v. Federal Communications Commission (decided May 23, 1938) in support of their contention. The only similarity lies in the fact that the aforementioned Rule 106.4 was involved. There were three appeals, and all were dismissed because of the lack of an appealable interest. Each was from a decision granting the application of WATR, Waterbury, Connecticut, which application was filed after those filed by two of the appellants—Pittsburgh Radio Supply House and Head of the Lakes Broadcasting Company. However, those two applications were for nighttime power increases in violation of the Commission's rules. The third appellant—Intermountain Broadcasting Corporation—had no application pending, and its aggrievement was wholly problematical. That part of the Court's decision upon which counsel for Schuylkill rely reads:

"As to it [Pittsburgh Radio Supply House], the record shows that it requested that Waterbury's application and its application for increased power be considered together. *This request was in line with the Commission's Rule 106.4.* If Pittsburgh's application had been for a lawful grant, and if it were shown that the Commission's prior consideration of Waterbury's application seriously prejudiced Pittsburgh, we would have a case in which we might say Pittsburgh had appealable interest as a 'person aggrieved,' notwithstanding the latitude which we have said should be permitted to the Commission in such matters * * *" [Italics supplied.]

The inapplicability of this reasoning to the Pottsville case is readily apparent. Pittsburgh's application was filed prior to that of Waterbury, not merely prior to the designation of the latter for hearing,

and hence came well within Rule 106.4. But it was not for a lawful grant. Here the Schuylkill application was filed not only twelve weeks after that of The Pottsville Broadcasting Company but also more than five weeks after the latter was designated for hearing. It was thus excepted from the operation of the Rule. Therefore, the Commission properly refused to heed the Schuylkill request that its application be heard with that of The Pottsville Broadcasting Company. To contend that this Court, in the Pittsburgh case, adopted a ruling requiring a contrary procedure is to contend for the invalidity of the very Rule (106.4) which has been recognized as proper.

Enough has been said to show that the alleged "diligence" of the Schuylkill Broadcasting Company cannot properly be made the basis for any contention under the rules of the Commission or under the decisions of this Court.

Counsel contend that the Schuylkill Broadcasting Company will be a "person aggrieved" if the application of The Pottsville Broadcasting Company be considered and granted without a comparative consideration of its application. But it fails to state that it will also be a "person aggrieved" if The Pottsville Broadcasting Company's application be granted on a comparative basis. They both cannot be granted. Therefore, one must be denied. Schuylkill counsel apparently fear that their application might be that one. But they filed their application with full knowledge that they could not, under the Commission's rules, be heard at the same time as The Pottsville Broadcasting Company, and that the application of the latter might be granted by the time theirs was ready for final action. They chose to take a chance; they should now abide the result.

The contention is also made that the Schuylkill Broadcasting Company will be deprived of a full and fair hearing and thereby denied due process of law if the application of The Pottsville Broadcasting Company be considered and granted without a comparative consideration of the Schuylkill application. This contention is predicated upon the assumption that oral argument before the Commission "constitutes a vital part of a full and fair hearing" and that such argument would be a "futility" if The Pottsville Broadcasting Company application were granted prior thereto. Would that be illegal? Is not any oral argument a "futility" that results in the denial of the application? Is it any the less a "full and fair hearing"? Or is it only "full and fair" when the "right" application is granted? Do not the Commission's own rules, which have the force and effect of law, mean anything, especially when coupled with the rule of reasonableness?

The Schuylkill Broadcasting Company insists upon its "right" to a comparative consideration but loses sight of the fact that such alleged "right" is based upon full compliance with the Commission's rules. It had a perfect "right" to file its application shortly after The Pottsville Broadcasting Company filed, and before the latter was designated for hearing more than six weeks later. Instead, it slept upon that "right." The Commission then permitted it to participate

in the hearing upon the application of The Pottsville Broadcasting Company and afforded it the opportunity to cross-examine the latter's witnesses and to introduce evidence. Thus it was given the right to have included in the record any facts which might show that the public interest would not be served by the grant of the application. But it failed to make any such showing. And when it appeared in this Court, through its brief in connection with petitioner's appeal, it did not even intimate that the Commission had no right to decide the case on the record as made and as presented, in substance, to this court, or that it (Schuylkill) had a "right" to comparative consideration with petitioner. Only when it is faced with the prospect of adversity does it claim a right—a right of which it failed to take advantage when the opportunity was presented.

If any party now has any right in this case, it is The Pottsville Broadcasting Company, and its right is to require adherence to the rules and the established and uniform practice of the Commission, and to insist upon respect for the decision of this Court.

The "Opposition" of the Schuylkill Broadcasting Company only serves to emphasize the need for the relief for which The Pottsville Broadcasting Company prays in its petition for writs of prohibition and mandamus.

Respectfully submitted.

ELIOT C. LOVETT,
729 Fifteenth Street, Washington, D. C.
CHARLES D. DRAYTON,
1001 Fifteenth Street, Washington, D. C.
Attorneys for Petitioner.

JULY 26, 1938.

Receipt of a copy of the foregoing "Reply to Opposition of Schuylkill Broadcasting Company to Petition for Writs of Prohibition and Mandamus" acknowledged this 26th day of July 1938.

(Sgd.) HAMPSON GARY,
Attorney for Respondent,
Federal Communications Commission.
(Sgd.) PHILIP G. LOUCKS,
Attorney for Schuylkill Broadcasting Company,
Intervener in the original proceeding.

[Clerk's certificate to foregoing paper omitted in printing.]

28 In United States Court of Appeals for District of Columbia

[Title omitted.]

Minute entry

January 10, 1939

The argument in the above entitled cause on the petition for writ of mandamus and prohibition was commenced by Mr. Eliot C. Lovett, attorney for petitioner (Appellant), continued by Mr. Wm. H. Bauer,

attorney for respondent, and concluded by Mr. Charles D. Drayton, attorney for petitioner.

Petitioner allowed to file comments on points and authorities filed by the Federal Communications Commission.

29 In United States Court of Appeals for the District of Columbia

No. 7016

THE POTTSVILLE BROADCASTING COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION; SCHUYLKILL BROADCASTING COMPANY, INTERVENER, APPELLEES

On Petition for Writ of Prohibition and Writ of Mandamus

(Argued January 10, 1939. Decided April 3, 1939)

Eliot C. Lovett and Charles D. Drayton, both of Washington, D. C., for appellant.

William J. Dempsey, General Counsel, William H. Bauer, Andrew G. Haley, Hampson Gary, General Counsel, George B. Porter, Assistant General Counsel, Fanney Neyman, Assistant Counsel, and Frank U. Fletcher, all of Washington, D. C., for Federal Communications Commission; and Arthur W. Scharfeld, Philip G. Loucks, and Joseph F. Zias, all of Washington, D. C., for Schuylkill Broadcasting Company.

Before GRONER, C. J., and STEPHENS and EDGERTON, JJ.

Opinion

GRONER, C. J.: Pottsville Broadcasting Company (petitioner) is a Maryland corporation. In May 1936 it applied to the Federal Communications Commission for a construction permit to erect a radio broadcasting station in Pottsville, Pennsylvania. The application was on the prescribed form and averred that there was public need for the service and that it would not cause objectionable interference with any existing station; that the station would be built and equipped in conformity with the Commission's standards and subject to its approval; that the applicant was legally, technically, and financially qualified; and that the public interest, convenience and necessity would be served by the grant to it of the permit. On July 2, 1936, the application was referred to an examiner; hearings were begun in September; and in October the examiner reported his findings of fact, concluded that the averments of the application had been proved, and recommended the granting of the application. The Commission allowed intervention and exceptions by the Schuylkill Broadcasting Company, which had applied for the same facilities shortly after petitioner's application

has been set for hearing, but whose record had not been made. In December 1936 the Broadcast Division of the Commission set petitioner's application down for oral argument. In May 1937 the Commission handed down its decision, denying petitioner's application.

In its statement of facts and decision the Commission said there existed a need for local service in Pottsville; that the equipment proposed to be used was capable of operating in conformity with the technical rules and regulations of the Commission; but that the showing of financial ability was not satisfactory; and for that reason it was not in the public interest to grant the license. The Commission added that the principal stockholder of the applicant did not reside in Pottsville, had no definite plans for spending a "percentage of his time" there, and had failed to show he was acquainted with the needs of the area proposed to be served and prepared to meet those needs.

From the order denying the application there was an appeal to this court. In May 1938 we decided that the Commission was in error in holding that petitioner had not shown adequate financial responsibility, and on this ground reversed the order. 98 F. 2d 288. As to the Commission's general inference, i. e., that it is desirable that those who control the policies of a local station should show themselves acquainted with the needs of the locality, we said that we knew from published reports of the Commission that it had not adopted a fixed and definite policy in that respect, nor sought to lay down a hard and fast rule; and in this view, and considering the good faith of the applicant and the conclusion of the Commission that the establishment of a station in Pottsville was desirable and in the public interest, we would without expressing any opinion of our own leave that question for reconsideration by the Commission.

When the case was remanded, petitioner asked the Commission to reconsider and grant its application. It pointed out that the Commission had never adopted a policy requiring a majority stockholder in the applicant corporation for a local station to be a resident of the area to be served. And it insisted that, since the application was not for a "local station" anyway, the question was not pertinent, and there was consequently nothing more to consider. The Commission, however, refused to accede to this position and entered an order for a new hearing on the applications of petitioner, Pottsville News and Radio Corporation (whose application had been filed seven months after the petitioner's), and Schuylkill Broadcasting Company. The Commission announced that it would hear and consider the applications "individually on a comparative basis, the application which in the judgment of the Commission will best serve public interest to be granted."

To prevent the carrying out of this order, petitioner applied to this court for a writ to prohibit the Commission from taking any steps or exercising any jurisdiction except as required by the judgment of this court and for a writ of mandamus to require the Commission to grant the application of the petitioner on the record as submitted to

and considered by this court. The Commission answered and insists that neither prohibition nor mandamus may be invoked to restrain it from exercising at any time its regulatory power conferred by law, or to circumscribe its discretion.

Stated in abridged form, the positions of the parties are these:

Petitioner insists that the order of the Commission indicates a definite intention to disregard the decision and mandate of this court, to consider petitioner's application de novo, and to compel
31 petitioner to contest its rights with new parties who were not parties to the original hearing and were never eligible to become parties under the Commission's rule,[3] and in consequence to base its new decision upon facts not properly before it.

The position of the Commission is that the order of this court was not final; that this court merely reversed the former order of the Commission and remanded the cause to it for further proceedings; and that in this aspect it is within its discretion to combine petitioner's application and other subsequently filed applications, thus placing all on a parity and reaching a conclusion on a comparative basis.

In view of what has been said, it will be obvious at once that the question we have to decide is: When this court reverses a decision of the Commission and remands the case for further proceedings, is the Commission required to reconsider the same record in the light of our opinion, or may it reopen the cause and hear it on an entirely new and different record? The Commission takes the latter view and insists that the statute, by conferring broad regulatory power and discretion in the granting of licenses, imposes upon it the power and the duty, upon remand, to reconsider the application in the light of events subsequent to the making of the original record. Stated in terms of this particular case, the question is whether the Commission, having decided that the petitioner was qualified in particular respects, may now disregard petitioner's priority and the case made by it and consider its application on a comparative basis with subsequent applications on records made after the Commission's original decision.

Sec. 402 of the Act (47 U. S. C. A. 402) applies to appeals from decisions of the Commission, and Sec. 402 (e) provides:

"At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court * * *. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari * * *."

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[3] Rule 106.4. "In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, excepting, however, applications filed after any such application has been designated for hearing." This has become Sec. 12.21 of the Commission's Rules of Practice and Procedure, effective January 1, 1939.

We have no doubt that as far as is practicable the order of the court entered on an appeal from the Commission ought to have the same effect and be governed by the same rules as apply in appeals from a lower federal court to an appellate federal court in an equity proceeding. The rule in such cases is stated in Sanford Fork & Tool Co., Petitioner, 160 U. S. 247, restated in Re Potts, 166 U. S. 263, and confirmed in D. L. & W. R. Co. v. Rellstab, 276 U. S. 1. Shortly
32 stated, the rule is that when a case has been decided on appeal and remanded to the trial court, the latter has no authority, without leave of the appellate court "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer". Re Potts, supra, at p. 267.

"The circuit court [1] is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded * * *. But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only * * *. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly." 160 U. S. 255-256.

Applying the rule to the case here, we have a situation in which it is apparent that the applicant for a radio license duly certified itself under the rules of the Commission as in all respects qualified to receive and exercise the permit. The examiner, to whom the application was referred, found all the material facts necessary to the grant in favor of the applicant. The Commission, on the report and exceptions filed by an applicant who had subsequently filed for the same facilities and who was permitted to intervene in opposition, affirmatively found that there was need of the station and that the equipment proposed to be used was in conformity with its rules and regulations; but held that the application should be rejected because "in the present state of the record, the applicant corporation does not appear to be financially qualified to construct the proposed station"; and as a sort of supplemental justification of the rejection, stated that the president of the applicant corporation had never resided in Pottsville and had no present purpose of residing there, but failed to find that fact an adequate ground for rejection. On appeal to this court we held that the Commission was in error in holding there was lack of financial qualification. Since we were uncertain whether the Commission intended its statement "that those who will control the policies of proposed new 'local' broadcast stations should show themselves to

[1] The Supreme Court was speaking in 1895, and this passage refers to the old federal circuit court, since abolished, and not to the circuit court of appeals.

be acquainted with the needs of the area proposed to be served and to be prepared to meet that need" to be a finding of lack of public interest, we remanded the case, with the comment that this ground of refusal never had been brought to our attention and that we were not advised whether it was the purpose of the Commission to adopt it as a rule or policy, but that if such action were taken, it should certainly be applied with uniformity and that, since there was
33 neither prior rule nor practice on which we could rely, we assumed the statement was secondary rather than primary. And accordingly we said that if the Commission should be of opinion that the application ought not to be granted because a stranger to Pottsville had the controlling financial interest and should adopt a rule with relation to that subject, we should feel impelled to accept the Commission's view. The case, with that question alone open, was remanded to the Commission for reconsideration.

In its opposition the Commission now says there are other questions which must be determined before it can find that the public interest will be served in granting petitioner's application. The only such matter pointed out is that the Commission had made no previous finding "as to the technical qualifications of the petitioner to operate the station, the Commission's duty under Section 303(q) of the Act to provide protection to air navigation was not discharged," but we find by reference to the Commission's findings that "the equipment proposed to be used by applicant is capable of operating in conformity with the technical Rules and Regulations of the Commission." This, we think, is a finding in favor of technical qualification, and we know of nothing either in the practice or rules of the Commission which requires more. The method of installation, which the Commission is required under Sec. 303(q) of the Act to regulate so as to avoid a menace to air navigation, has relation to the transmitter location, but it is hardly ingenuous to say that this is a matter as to which the Commission ordinarily makes any finding prior to the grant of a construction permit. On the contrary, it is the custom of the Commission to reserve that question and to make the grant subject to its approval of the location and the antenna system. And this would certainly seem all that is necessary to protect the public interest. The custom was recognized by petitioner in this case, and its original application was made subject to the Commission's subsequent approval of the site. In view of this, it seems to us to be going too far to say that this reserved right of approval will justify the Commission in reopening the record for the introduction of new and different facts having no relation to that question. In saying this much, we do not wish to be understood as implying that the Commission may not, upon a showing of newly discovered evidence or upon a showing of supervening facts which go to the very right of the applicant to have a license, remake the record in those respects without the necessity of a bill of review or other like technical methods of bringing into the record new and previously undiscovered facts, but there should be some control of the exercise of this right, and we think control is of neces-

sity lodged in this court. But we think it is obvious that the particular objections of the Commission to a reconsideration on the record—to which we have referred—are mere makeweights, and that the real bone of contention is the insistence by the Commission upon absolute authority to decide the rights of applicants for permits without regard to previous findings or decisions made by it or by this court.

While it is true the authority to grant is exclusive in the Commission, and while it is also true, as we have said before, that the license conferred on the owner of a radio broadcasting station is permissive only and within the power of the Commission by congressional
34 delegation, we cannot consent to the view that either the right to grant or the right to revoke is subject to the uncontrolled discretion of that tribunal. In granting licenses, the Commission is required to act "as public convenience, interest or necessity requires." This criterion is not to be interpreted as setting up a standard so indefinite as to confer unlimited power. Nelson Bros. Co. v. Federal Radio Commission, 289 U. S. 266. When an applicant for a station who is qualified as to citizenship and otherwise has submitted his cause to the Commission and the Commission in denying the application has filed, as the Act requires and as we have time and again insisted should be done, "a full statement in writing of the facts and grounds for its decision" and an appeal as authorized by law is taken to this court, and the decision of the Commission reversed and the cause remanded for proceedings in accordance with our opinion and order, it is the duty of the Commission to comply with that order and, unless for some exceptional reason it obtains leave of this court to reopen the case, to reconsider the matter on the record and in the light of this court's opinion.

Here, as we have pointed out, petitioner was first in the field. Its application was duly set down for hearing and was duly heard by the Commission on the record made. This was in accordance with the Commission's Rule 106.4,[4] which recognizes priority of filing when subsequent applications are made after the prior one has been set for hearing. In such a case petitioner ought not now to be put in any worse position than it occupied on the original hearing, and therefore ought not to be required any more now than originally to be put in hodgepodge with later applicants whose records were not made at the time of the previous hearing. On this state of facts, we are of opinion the Commission should rehear the application on the record and in the light of our opinion. We believe that this expression of our views on the subject will obviate the necessity of issuing the writ. If it becomes necessary for the protection of petitioner's rights, counsel may submit a proposed form of order within 30 days. Otherwise an order will be entered denying the petition for prohibition and mandamus.

Judgment suspended for 30 days.

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[4] Now Sec. 12.21 of the Commission's Rules of Practice and Procedure.

35 *Memorandum*

Federal Communications Commission's Petition for Rehearing and Motion for Entry of Judgment and for Stay of Execution, Filed April 20, 1939.

36 *Memorandum*

Intervener Schuylkill Broadcasting Company's Petition for Reconsideration and Revision of Opinion, Filed April 20, 1939.

37 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Motion of petitioner for order for issuance of writ of mandamus and for suspension of action re writ of prohibition

Filed May 1, 1939

It appearing that the Federal Communications Commission has not complied, and does not intend to comply, with the opinion rendered herein by this Court on April 3, 1939, on the petition of The Pottsville Broadcasting Company for writs of prohibition and mandamus, and that the thirty-day period is about to expire which is provided therein for the submission of a proposed form of order (if an order should become necessary for the protection of petitioner's rights), the petitioner, by its counsel, in order to protect its rights, now moves that this Honorable Court enter an order for the issuance of the writ of mandamus as prayed in the petition and that action upon the prayer for a writ of prohibition be suspended until further order of the Court, and to this end, and pursuant to the suggestion of the Court, counsel submit with this motion a proposed form of Order.

ELIOT C. LOVETT,
CHARLES D. DRAYTON,
Counsel for Petitioner.

Receipt of a copy of the foregoing Motion, together with the proposed form of Order, acknowledged this 1st day of May 1939.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.
PHILIP G. LOUCKS,
Counsel for Schuylkill Broadcasting Company.

38 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order granting writ of mandamus

This cause came on for hearing on the petition of The Pottsville Broadcasting Company for a writ of prohibition and a writ of mandamus and upon the answer of the Federal Communications Commission and the petitioner's reply thereto, and the cause having been fully argued by counsel and the briefs of the parties considered, and it appearing to the Court—

1. That the Court entered its judgment herein on May 9, 1938, reversing the order of the Federal Communications Commission and remanding the case for reconsideration by the Commission on a question of secondary, rather than primary, importance having to do with the establishment by the Commission of a policy concerning the grant of "local" station licenses to local people, and the application of such a policy with substantial uniformity;

2. That on May 23, 1938, petitioner (then appellant) filed with the Commission a petition for the granting of its application for a permit to construct a radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power, from which petition it appears that the Commission has not established a policy requiring the majority stockholder of a corporate applicant for a "local" station to be a resident of the area to be served, but has consistently pursued a contrary policy, both before and after the decision of the Court herein, and has evidenced its intention
39 of continuing such contrary policy; that since petitioner's application is not for a "local," but for a "regional," station, the question is not pertinent in any event, and consequently there is nothing more to be considered by the Commission; that the Commission and this Court has found petitioner to be otherwise qualified and has determined that there is a public need for the radio station at Pottsville; that the Commission denied the said petition for the grant of the application on June 9, 1938, and at the same time entered an order for a reargument on petitioner's application to be heard along with two subsequently filed applications seeking the same facilities at Pottsville, said applications having not been fully heard by the Commission and the records relating thereto never having been before this Court; and that the Commission advised petitioner that it would consider these three applications "individually on a comparative basis, the application which in the judgment of the Commission will best serve the public interest to be granted;"

3. That on July 1, 1938, petitioner filed with this Court its verified petition setting forth the facts above stated and praying, inter alia, for the issuance of a writ of prohibition directed to the Federal Com-

munications Commission and the members thereof to prohibit the aforesaid action by the Commission, and also for writ of mandamus to require the Commission to render a decision in this case in conformity with the judgment heretofore rendered by this Court;

4. That the Commission agreed to withhold its contemplated consideration of petitioner's application and the two applications for the same facilities in Pottsville pending final determination of the case, thereby making it unnecessary for the Court then to take action on the prayers for rules to show cause; that the Court thereupon ordered a hearing upon the petition; and that a hearing was held on January 10, 1939;

40 5. That on April 3, 1939, this Court rendered an opinion recognizing the validity of the grounds urged in support of the aforesaid petition and stated that the Commission should reconsider the application on the record and in the light of the opinion;

6. That the petition for rehearing filed herein by the Commission on April 20, 1939, and denied by this Court on May —, 1939, clearly shows that the Commission has refused to reconsider the application on the record and in the light of our opinion, and will continue to refuse compliance therewith;

7. That there has been no showing of newly discovered evidence or of supervening facts which go to the very right of the petitioner to have a radio station license, and that no leave of this Court has been asked or obtained to that end;

8. That the need for the station, and the legal and technical qualifications of the petitioner, where initially recognized and found by the Commission; that this Court held that petitioner was also financially qualified; that the Commission has pursued and continues to pursue a policy of granting licenses for "local" stations to corporations in which the majority stockholder is not a resident of the community to be served, and proposes no change respecting such policy; and that petitioner's application concerns a "regional" station which would not be affected by any proposal to establish a new policy as to "local" stations;

9. That the established facts compel the conclusion that the statutory criterion of public interest, convenience, and necessity will be met by granting the application; and that the Commission is therefore without further discretion in the matter, and is under the statutory duty of granting the petitioner's application;

41 It is this — day of May, 1939, ordered that the writ of mandamus issue out of and under the seal of this Court directed to the Federal Communications Commission and the members thereof, namely, Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to grant the application of The Pottsville Broadcasting Company for a permit to construct a new radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power; and

It is further ordered that, pending action by the Federal Communications Commission in the light of the issuance of the writ of mandamus, action by the Court upon the petition for a writ of prohibition be and is postponed.

By the Court:

——— ———, *Chief Justice.*

42 In United States Court of Appeals for the District of Columbia

No. 7016

THE POTTSVILLE BROADCASTING COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION; SCHUYLKILL BROADCASTING COMPANY, INTERVENER, APPELLEES

Opinion on petitions for rehearing

Filed May 5, 1939

[File endorsement omitted.]

PER CURIAM:

After due consideration, the court is of the view that it should adhere to the opinion announced in this case April 3, 1939. For that reason, the petition of Federal Communications Commission for rehearing is denied.

First. The court has carefully examined the decision of the Supreme Court in Ford Motor Co. v. Labor Board, 305 U. S. 364, and can find nothing there in conflict with the opinion in this case.

Second. The petition for rehearing of Schuylkill Broadcasting Company, Intervener, in the same case, is also denied. The opinion of this court expressly held that the reconsideration by the Commission should be on the record originally considered. Whatever rights Schuylkill then, as intervener, was entitled to assert, it is entitled to assert now. No more was said in the opinion than that Schuylkill's own record on its application, which was made subsequent to the hearing by the Commission on the Pottsville Company's application, could no more be considered now than under the Commission's rule at the time of the Commission's original hearing on Pottsville's application.

The Commission having intimated a desire to apply to the Supreme Court, the writ of mandamus will issue as prayed but will be stayed for thirty days from this date.

MAY 5, 1939.

43 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Motion for clarification of per curiam decision of May 5, 1939

Filed May 12, 1939

To the Honorable, the CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA:

Comes now the Federal Communications Commission and moves this Honorable Body to clarify its per curiam decision of May 5, 1939, in this case and in support of this motion shows the following:

1. The decision of this Court rendered in this case on May 5, 1939, denied respondent's Petition for Rehearing filed on April 20, 1939 and concluded with the following statement: "The Commission having intimated a desire to apply to the Supreme Court, the writ of mandamus will issue as prayed but will be stayed for thirty days from this date."

2. The respondents are unable to determine from the Court's Decision of May 5, 1939 precisely what the writ of mandamus, which this Court will issue, will order respondents to do. It is respectfully submitted that the Court's statement that the writ of mandamus will issue "as prayed" requires clarification for the reasons stated in the following paragraphs.

3. The Petition for Writ of Mandamus filed by the petitioner on July 2, 1938 contains the following prayer:

"WHEREFORE, the premises considered, your petitioner prays:

* * * * * * *

3. For a writ of mandamus to be issued from this Honorable Court directed to the Federal Communications Commission and the members thereof commanding them (a) to render a decision in this case within a time certain, to be fixed by this Court, and in conformity with the judgment heretofore rendered by this Court; (b) to base the decision on the one question of policy as to which the case was remanded for reconsideration by the Commission; and (c) to grant the application of your petitioner on this record, as submitted to and considered by this Court;"

44 4. This Court by its decision of April 3, 1939, decided this case in favor of the petitioner and stated in its opinion: "If it becomes necessary for the protection of petitioner's rights, counsel may submit a proposed form of order within thirty days."

5. Petitioner, on May 1, 1939, within thirty days from this Court's decision of April 3, 1939, filed a motion praying this Court to enter an order for the issuance of a writ of mandamus and submitted a proposed form of order as follows:

"It is this — day of May 1939 ordered that the writ of mandamus issue out of and under the seal of this Court directed to the Federal

Communications Commission and the members thereof, namely Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to grant the application of The Pottsville Broadcasting Company for a permit to construct a new radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power; * * *"

6. Since the basic question in this case is the extent and nature of the power of this Court to direct respondents' action in connection with further proceedings on petitioner's application (for construction permit for radiobroadcast station), it is essential, if the case is to be properly presented to the Supreme Court of the United States for review, that there be no possibility of doubt as to precisely what this Court is ordering respondents to do. Counsel for respondents herein inquired of the Clerk of this Court whether the Court's decision of May 5, 1939, means that the writ of mandamus will issue directing the Commission to perform the acts requested in the petition filed July 2, 1938, or the acts specified in the proposed order submitted by petitioner on May 1, 1939, or will require the Commission to perform certain acts different from those requested either in said petition or specified in said proposed order. The Clerk of this Court was unable to inform counsel in the premises and accordingly this motion is filed requesting the Court to clarify its decision of May 5, 1939.

45 Wherefore, respondents pray the Court to clarify its decision of May 5, 1939, by specifying what the writ of mandamus will contain or, in the alternative, for the Court actually to issue said writ but postpone its effective date pending application by respondents to the Supreme Court for writ of certiorari or other appropriate relief.

Respectfully submitted.

FEDERAL COMMUNICATIONS COMMISSION,
By William J. Dempsey,
WILLIAM J. DEMPSEY,
General Counsel.
William C. Koplovitz,
WILLIAM C. KOPLOVITZ,
Asst. General Counsel.

No objection to the within motion is interposed by The Pottsville Broadcasting Company, petitioner or Schuylkill Broadcasting Company, intervener.

ELIOT C. LOVETT,
Counsel for the Pottsville Broadcasting Company, Petitioner.

ARTHUR W. SCHARFELD,
Counsel for Schuylkill Broadcasting Company, Intervener.

46 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted]

Answer to motion for clarification

Filed May 13, 1939

The Pottsville Broadcasting Company, petitioner herein, interposes no objection to the motion of the Federal Communications Commission for clarification of the per curiam decision rendered on May 5, 1939, but, by way of answer, submits the following paragraphs as alternative suggestions in lieu of the paragraph immediately following paragraph numbered nine in the proposed form of Order which petitioner presented to the Court on May 1, 1939, pursuant to its decision of April 3, 1939:

ALTERNATIVE NO. 1

It is this — day of May 1939, ordered that the writ of mandamus issue out of and under the seal of this Court directed to the Federal Communications Commission and the members thereof—Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to carry out the judgment of this Court, namely, (a) to reverse the finding of the Commission that The Pottsville Broadcasting Company is not financially qualified to construct the proposed station, (b) to reverse the finding of the Commission that the public interest, convenience, and necessity would not be served by granting the application of The Pottsville Broadcasting Company, and (c) to grant the application of The Pottsville Broadcasting Company for a permit to construct a new radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power; and

47 ALTERNATIVE NO. 2

It is this — day of May 1939, ordered that the writ of mandamus issue out of and under the seal of this Court directed to the Federal Communications Commission and the members thereof—Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to carry out the judgment of this Court, namely (a) to find that The Pottsville Broadcasting Company is financially qualified to construct the proposed station, (b) to find that the granting of the application of The Pottsville Broadcasting Company will serve the public interest, convenience, and necessity, and (c) to grant the application of The Pottsville Broadcasting Company for a permit to

construct a new radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power; and

Respectfully submitted.

THE POTTSVILLE BROADCASTING COMPANY,
By ELIOT C. LOVETT,
CHARLES D. DRAYTON, *Its Counsel.*

Receipt of a copy of the foregoing Answer acknowledged this 13th day of May, 1939.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.
ARTHUR W. SCHARFELD,
Counsel for Schuylkill Broadcasting Company.

48 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Order for issuance writ of mandamus

Filed May 15, 1939

This cause came on to be heard upon the petition for a writ of mandamus, the answer of the respondent, and the reply of the petitioner; and after hearing counsel, and the court being fully advised in the premises, it is ordered, adjudged, and decreed by the Court that a writ of mandamus issue out of and under the seal of this Court, directed to the Federal Communications Commission and the members thereof, namely, Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to carry out the judgment of this Court, namely, (a) to set aside the order of the Federal Communications Commission dated June 9, 1938, which denied the application of petitioner, Pottsville Broadcasting Company, and designated said application for hearing on a comparative basis with the applications of the Pottsville News and Radio Corporation and of the Schuylkill Broadcasting Company, and (b) to hear and reconsider the application of petitioner, Pottsville Broadcasting Company, on the basis of the record as originally made and in accordance with the opinions of this Court in this cause filed on May 9, 1938, and on April 3, 1939.

The issuance of the writ will be stayed for thirty days.

PER CURIAM.

Dated May 15, 1939.

49 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Designation of record

Filed June 5, 1939

The clerk will please prepare a transcript on application to the Supreme Court of the United States for certiorari in the above-entitled cause, including therein the following:

1. This Court's opinion in Pottsville Broadcasting Company, appellant v. Federal Communications Commission; Schuylkill Broadcasting Company, intervener, appellees, rendered on May 9, 1938.

2. This Court's judgment in the same case, filed May 9, 1938.

3. The Pottsville Broadcasting Company's petition for writ of prohibition and for writ of mandamus, but excluding brief in support thereof, filed with this Court on July 2, 1938.

4. Opposition of Federal Communications Commission to petition of Pottsville Broadcasting Company for a rule to show cause why a writ of prohibition and writ of mandamus should not issue, but excluding brief in support thereof, filed July 12, 1938.

5. Opposition of Schuylkill Broadcasting Company to the petition of the Pottsville Broadcasting Company for issuance of writs of prohibition and mandamus to the Federal Communications Commission, filed July 25, 1938.

50 6. Minute entry of argument of January 10, 1939.

7. This Court's opinion in Pottsville Broadcasting Company v. Federal Communications Commission; Schuylkill Broadcasting Company, intervener, appellees, rendered on April 3, 1939.

8. Minute entry of Federal Communications Commission's petition for rehearing and motion for entry of judgment and stay of execution, filed on April 20, 1939.

9. Minute entry of Schuylkill Broadcasting Company's petition for reconsideration and revision of opinion, filed on April 20, 1939.

10. The Pottsville Broadcasting Company's motion for order for issuance of writ of mandamus and for suspension of action re writ of prohibition, and accompanying order, filed May 1, 1939.

11. This Court's per curiam order filed on May 5, 1939, directing that the writ of mandamus will issue as prayed but will be stayed for 30 days.

12. Federal Communications Commission's motion for clarification of per curiam decision of May 5, 1939.

13. Pottsville Broadcasting Company's answer to Federal Communications Commission's motion for clarification.

14. This Court's per curiam order of May 15, 1939, containing the terms of and ordering the issuance of a writ of mandamus.
15. This designation.

Robert H. Jackson,
ROBERT H. JACKSON,
Solicitor General.

51 Service of copy of Designation of Record acknowledged this — day of June 1939.

_____,
Counsel for Pottsville Broadcasting Company.

_____,
Counsel for Schuylkill Broadcasting Company.

52 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1939

Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 5 1939
CHARLES ELMORE CROPLEY
CLERK

No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1939

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

THE POTTSVILLE BROADCASTING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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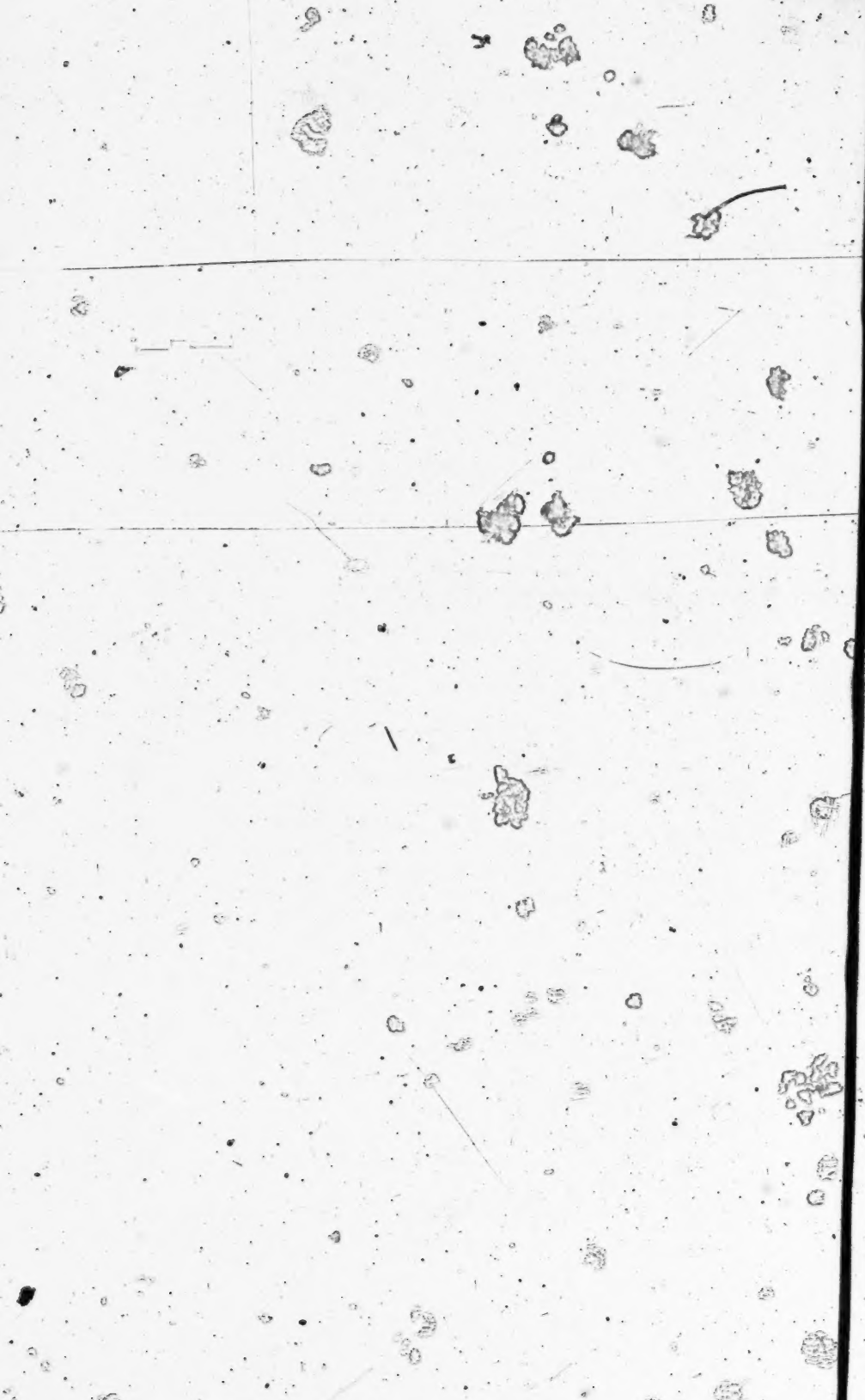

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

THE POTTSVILLE BROADCASTING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia, entered in the above cause on April 3, 1939, and the decree entered pursuant thereto on May 15, 1939, commanding the Commission to set aside an order relating to the application of the Pottsville Broadcasting Company for a construction permit for a radio broadcast station having the effect of designating the application for hearing on a comparative basis with other applications, and commanding the Commission to hear and reconsider the application of the Pottsville Broadcasting Company on the basis of the record as originally made.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia (R. 24–29, 33) have not yet been reported.

JURISDICTION

The decision of the United States Court of Appeals sought to be reviewed was entered on April 3, 1939 (R. 24), its opinion on rehearing on May 5, 1939 (R. 33), and its decree on May 15, 1939 (R. 37). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Commission denied respondent's application for a construction permit for a radio broadcast station on the primary ground that it was not financially responsible and on the secondary ground that its chief stockholder was not a local resident. The court below reversed on the primary ground and remanded for the Commission's independent consideration of the secondary ground. The Commission set the remanded cause for oral argument, together with two other conflicting applications, which had been filed and heard before an examiner after the respondent's application. The question is whether the court below has power to issue a writ of mandamus to compel the Commission to reconsider petitioner's application on the original record and without regard to the subsequent applications.

STATUTE INVOLVED

The applicable provisions of the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended, are printed in the Appendix, *infra*, pp. 23–27.

STATEMENT

On May 19, 1936, the Pottsville Broadcasting Company filed an application for a construction permit to erect a new radio broadcast station at Pottsville, Pennsylvania, requesting the use of the frequency 580 kilocycles, 250 watts power, daytime only (R. 5, 20). The Commission on July 2, 1936, designated this application for hearing before an examiner; on August 12, 1936, this hearing was set for September 30, 1936, when it was held (R. 13, 20). On August 10, 1936, the Schuylkill Broadcasting Company filed its application for a construction permit, requesting the same facilities as the Pottsville Broadcasting Company for use in the same city (R. 13). On September 3, 1936, a request to designate the Schuylkill Broadcasting Company's application for hearing on the same day as the application of the Pottsville Broadcasting Company was filed by the Schuylkill Company and consented to by the Pottsville Broadcasting Company (R. 13–14). This petition was denied by the Commission (R. 14), but the Commission on September 8, 1936, permitted the Schuylkill Company to intervene in the hearing held on September 30, 1936, on the application of the Pottsville Broadcasting Company (R. 13). On November 5, 1936,

an examiner of the Commission submitted his report, No. I-305, recommending that the application of the Pottsville Broadcasting Company be granted (R. 1; 15). Exceptions were filed by the Schuylkill Company on November 20, 1936. On May 4, 1937, the Commission denied the application of the Pottsville Broadcasting Company, effective July 6, 1937 (R. 15).

On December 7, 1936, the Pottsville News and Radio Corporation filed its application for a construction permit requesting the same facilities in the same city as the Pottsville Broadcasting Company and the Schuylkill Broadcasting Company (R. 20). On April 12, 1937, the applications of the Schuylkill Broadcasting Company and the Pottsville News and Radio Corporation were heard in a consolidated hearing (R. 15, 20). The Pottsville Broadcasting Company appeared and participated in the consolidated hearing on these applications (R. 15). On June 24, 1937, the Commission's examiner submitted his report No. I-442, recommending that the application of the Schuylkill Company be granted for a construction permit to operate a daytime radio station at Pottsville, on the frequency 580 kilocycles, 250 watts power (R. 16). Oral argument on the Pottsville News and Radio Corporation application and the Schuylkill Company application was indefinitely continued by the Commission, pending decision by the court below on the appeal of the Pottsville Broad-

casting Company from the Commission's denial of its application (R. 16).

This appeal was filed in the court below on July 26, 1937 (R. 15). On May 9, 1938, the court in *Pottsville Broadcasting Company* v. *Federal Communications Commission*, 98 F. (2d) 288, reversed the determination of the Commission denying the application of the Pottsville Broadcasting Company and remanded the case to the Commission for reconsideration in accordance with the views expressed in that opinion (R. 1–4). The court below reversed the Commission on the ground that the appellant and the Commission had made a mutual mistake in assuming that subscriptions to stock of the applicant corporation were not binding without the approval of the Pennsylvania Securities Commission.[1] The court stated that it was unable to determine whether the Commission's further objection to the granting of the application, on the ground that the applicant's principal stockholder was not a local resident and thus was not acquainted with the needs of the area proposed to be served, would have been controlling in the absence of the erroneous doubt as to the financial responsibility of the Company, and therefore reversed for reconsideration by the Commission. (R. 1–4.)

[1] It may be noted that the error arose from the evidence given by the chief officer of the Pottsville Broadcasting Company (R. 3).

The Pottsville Broadcasting Company on May 23, 1938, requested the Commission to grant its application (R. 16). On June 9, 1938, the Commission took the following action: (1) It denied without prejudice the petition of the Pottsville Broadcasting Company for grant of its application for construction permit. (2) It granted the petition of Pottsville News and Radio Corporation, for oral argument on the applications of all three of the applicants for identical facilities. (3) The Commission directed that thereafter it would consider these applications individually on a comparative basis, although not in a consolidated proceeding, and would grant the application which in the judgment of the Commission would best serve the public interest. (R. 8.)

The Pottsville Broadcasting Company applied to the court below for the issuance of a writ of prohibition to prevent the Commission from (a) hearing argument or reargument except on the one question upon which the case was remanded; (b) from considering the application of petitioner on a comparative basis with other applications subsequently filed; (c) from hearing argument upon the other applications until such time as the Commission shall have complied with the judgment of the Court; (d) from taking any other procedural steps or exercising jurisdiction other than that contemplated in the judgment of the court reversing the determination of the Commission. It also

asked for a writ of mandamus commanding the Commission (a) to render a decision, within a time fixed by the court, in conformity with the judgment earlier rendered by the court; (b) to base that decision on the one question with respect to which the case was remanded; and (c) to grant the application of the petitioner on the record as submitted and considered by the court (R. 11).

The court below, on April 3, 1939, rendered an opinion which purported to grant the relief prayed but indicated that it did not think it necessary to issue the writs of prohibition and mandamus, upon the assumption that the Commission would follow the views expressed therein (R. 29). The Commission on April 20, 1939, filed a petition for rehearing and motion for entry of judgment (R. 30). On May 5, 1939, the court in a *per curiam* opinion denied the petition for rehearing (R. 33) and on May 15, 1939, entered an order for issuance of a writ of mandamus commanding the Commission (a) to set aside the order denying the application of the Pottsville Broadcasting Company and designating such application for hearing on a comparative basis, and (b) to hear and reconsider the application of the Pottsville Broadcasting Company on the basis of the record as originally made (R. 37). Issuance of the writ of mandamus was stayed for 30 days pending the filing of this petition for a writ of certiorari (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In misinterpreting Section 402 (e) of the Communications Act of 1934, providing that "review by the court shall be limited to questions of law";

2. In holding that it could issue a writ of mandamus to control the administrative functions of the Commission;

3. In holding that an appeal from the Commission should have the same effect and be governed by the same rules as an appeal from a lower federal court to an appellate court;

4. In assuming that the Commission was not conforming and would not conform fully and properly with the previous decision of the court below in this case;

5. In misconstruing the rules of practice of the Commission, particularly Rule 106.4 applicable to the fixing of dates for hearings on conflicting applications for related matters:

6. In subordinating the interests of the public in the administration of the Communications Act of 1934 to the private interest of a particular applicant who happened to be the first to file for given facilities and also has obtained judicial review of the Commission's denial of its application;

7. In holding that the court, after entering its judgment under Section 402 (e) of the Communications Act of 1934, has authority to control the

Commission's action in respect of matters not in issue before the court or included in its judgment of reversal;

8. In issuing a writ of mandamus where the petitioner had not exhausted its administrative remedies, had not shown a clear right to the relief or any threat of injury if the writ were denied, and asked relief which contradicted the statutory duty of the Commission;

9. In directing the Commission to set aside its order denying without prejudice the application of the Pottsville Broadcasting Company and designating the application for hearing on a comparative basis; and

10. In commanding the Commission to hear and reconsider the application of the Pottsville Broadcasting Company on the basis of the record as originally made.

REASONS FOR GRANTING THE WRIT

The court below has granted respondent the extraordinary relief of a writ of mandamus directed against the Federal Communications Commission to prevent it from considering respondent's application for a construction permit on a comparative basis with two other conflicting applications. This decision seems to have been somewhat influenced by the belief that, because respondent "was first in the field", it should receive priority over subsequent applications (see R. 29). But the primary ground of the decision was the belief that such action vio-

lated the earlier judgment of the court below. It had earlier reversed the Commission in its denial of the application on one ground and had not been sure whether a second objection of the Commission would alone have been controlling. "The case, with that question alone open, was remanded to the Commission for reconsideration" (R. 28). Because the Commission undertook to consider other applications and other issues, the court ordered a writ of mandamus to issue which would prevent considering the three applications on a comparative basis and which would command the Commission to consider respondent's application "on the basis of the record as originally made" (R. 37).

We believe that this decision exceeds the statutory powers of the court below, that it is an unwarranted invasion of the administrative field, and that it overrides the basic purpose of the licensing requirements of the Communications Act of 1934. It seems evident, in any event, that principles of the gravity of those resulting from the decision below should not be introduced or established save on the full consideration of this Court.

1. The history of the legislative precursors of the Communications Act of 1934 offers a forceful commentary on the rigid demarcation of the administrative from the judicial functions. The decision below seems to fly in the face of the decisions of this Court which led to and which recognized that separation of judicial and administrative powers.

The Radio Act of 1927 (c. 169, 44 Stat. 1162, 1169) authorized the United States Court of Appeals for the District of Columbia to hear, review and determine denials of applications for radio stations and authorized that court to alter or revise the decision appealed from "and enter such judgment as to it may seem just." This Court, in *Federal Radio Commission v. General Electric Company,* 281 U. S. 464, held that the judicial review provisions of the Radio Act were so broad as to make the Court of Appeals "a superior and revising agency in the same field" and that this Court could not review the decisions of that court without entering into a nonjudicial field in violation of constitutional limitations. Congress thereupon amended the Radio Act of 1927 to provide that "the review by the court shall be limited to questions of law" and that "in event the Court shall render a decision and enter an order revising the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court" (48 Stat. 1094). These provisions are identical with those found in Section 402 (e) of the Communications Act, *infra.* In *Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266, this Court held that the amended statute "contemplates a judicial judgment by the Court of Appeals", so that this Court had jurisdiction to review the judgment of the Court of Appeals.

It is abundantly plain, therefore, that the court below under this statute cannot act as "'a superior

and revising agency' in the administrative field" (*Radio Commission* v. *Nelson Bros. Co., supra,* 274). That is precisely what it has done. After determining, in its first opinion, that the Commission erred as a matter of law in denying respondent's application because its stock subscription had not been approved by the Pennsylvania Securities Commission, the court had no authority to prescribe that the Communications Commission must ignore other conflicting applications, must confine itself to the evidence before it at the first hearing, and (in necessary effect) that the Commission must grant respondent's application unless it determined that the non-residence of the chief stockholder was, standing alone, a sufficient ground for denial. The choice between conflicting applications, the preference that as a general rule should be given the earlier applicant, and the desirability of reopening proceedings for further evidence, are matters peculiarly administrative in their nature. The statute and the decisions of this Court commit their decision to the Commission, not to the court below.

The court seems (R. 26–27) to have justified its decision on the ground that Section 402 (e) directs it, in the event of reversal, to "remand the case to the Commission to carry out the judgment of the court". But this Court has already settled that this provision "means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of

law." *Radio Commission* v. *Nelson Bros. Co., supra,* 278. We are at a loss to see why the mere prospect of "further action", sanctioned by this Court, should be thought such a departure from the first judgment of the court below as to warrant mandamus; certainly there is no charge that the Commission will disregard the rulings of the Court of Appeals on the issues which were before that court on the appeal from the Commission's denial of the respondent's application.

The court below rested its assumption of power on the analogy to appellate review of equity cases, where after remand the equity court has no power without leave of the appellate court to grant a new trial or to hear new defenses (R. 27). We need not stop here to develop the differences between the issues tried in equity cases and in administrative hearings to determine if a broadcasting construction permit should be granted, or to emphasize the Commission's statutory duty to represent the interest of the public. For it is settled that remand of a cause to an administrative tribunal involves wholly different consequences. In *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364, the Court affirmed a decision granting the petition of the Board for a remand before argument in order that it might correct possible procedural defects. The provisions governing review are substantially similar in the Communications and the National Labor Relations Acts. The *Ford* decision was reached because a similar course would be followed if the

court itself were to reverse and remand the cause. The Court said (p. 374):

> The "remand" does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law. See *Federal Radio Comm'n* v. *Nelson Brothers Co.*, 289 U. S. 266, 278.
>
> Such a remand does not dismiss or terminate the administrative proceeding. * * * If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken. * * *

Thus, even if an equity court under comparable circumstances would be powerless to hear new issues,[2] the administrative tribunal is subject to no such limitation.

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[2] This is by no means certain. A judgment of reversal by an appellate court "is only final when it also enters or directs the entry of a judgment which disposes of the case". *Smith* v. *Adams*, 130 U. S. 167, 177. As previously pointed out, however, the Court of Appeals for the District of Columbia has no authority finally to dispose of any case involving an application for a permit to construct a radio station. The Commission is, therefore, possessed of at least as broad powers as those of a lower court, which may consider and decide any question left open by the judgment of reversal. "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues". *Sprague* v. *Ticonic National Bank*, No. 543, October Term, 1938; see, also, *Mutual Life Insurance Company* v. *Hill*, 193 U. S. 551; *In re Sanford Fork & Tool Company, Petitioner*, 160 U. S. 247.

Nor can the decision below be justified by the provision in Section 402 (e) that "the court's judgment shall be final." This means that there can be no reexamination of issues settled by that judgment; it does not mean that the statutory duties of the Commission are to come to a halt.

2. The decision below is at war with the basic purpose of Sections 319 and 309 (a) of the Communications Act of 1934, *infra*, and will seriously hamper the Federal Communications Commission in its administration of that Act.

Section 319 (a) provides that the Commission may grant a construction permit "if public convenience, interest or necessity will be served by construction of the station." Section 309 (a) provides for the issuance of a station license, following the construction permit, if upon examination of the application the Commission determines that its granting will serve the "public interest, convenience, or necessity." The nature of the portion of the radio spectrum available for broadcasting is such that only a limited number of stations can operate within a particular area. Where, as here, several applicants request identical facilities, the grant of a permit to one station necessarily requires its denial to the others. Section 319 (a) requires the Commission not only to determine if a given application is in the public interest, but which of the competing applications will *best* serve the public interest. *Radio Commission* v. *Nelson Bros. Co.*,

supra, 285. Under the decision below, if the denial of one application upon a given ground has been reversed by the Court of Appeals, the applicant receives a preferred status so that the Commission would be powerless were it to determine another applicant to be more desirable in the public interest.

The court below could hardly have supposed the respondent, as a sort of added bounty for its first victory in the Court of Appeals, to have acquired immunity from the operation of Section 319 (a). It, of course, did not presume to say that the other applications—not acted on by the Commission and not before the court—would be less in the public interest than that of respondent. It must, therefore, have read the decision of the Commission as holding that respondent's application should at all costs be granted if it were financially responsible and if the non-residence of its principal stockholder were not fatal. But by writ of mandamus to hold the Commission to this doubtful interpretation of its opinion is to preclude reexamination by the Commission, in the light of subsequent applications, of its first decision as to public interest. The act contains no such self-defeating limitation on the Commission's duty. See *Radio Commission* v. *Nelson Bros. Co.*, *supra*, 285.

The court seems also to have been influenced by the fact that respondent "was first in the field" (R. 29). But Section 319 (a) requires that the permit be granted to the best qualified applicant, not to the first to file his application. The licensing

provisions are designed to secure the best use of the limited broadcasting facilities, and not to reward the victor in a race of diligence. In *Radio Commission* v. *Nelson Bros. Co., supra,* the Court affirmed a decision of the old Commission which terminated licenses of stations already in existence and rendering satisfactory service, in order to make way for wider use of a station offering substantially preferable programs.

Again, although the court did not base its decision on this, it emphasized (R. 26, 29) the Commission's rule of practice[1] that "the Commission will, so far as practicable, endeavor to fix the same date * * * for hearings on all applications which * * * present conflicting claims * * * excepting, however, applications filed after any such application has been designated for hearing." The excepting clause in this rule of procedural convenience seems to have been read by the court below as giving an absolute right of priority to the applicant whose application has been set for hearing before other applications are filed. But the rule, as the Commission urged below, merely provides that subsequent applications will not be set for hearing on the same date as those already set for hearing, and has no bearing on the order in which the applications will finally be decided. And even if the court below were correct, it would be in flagrant

[1] Rule 106.4; the rule has been superseded by sections 1.193 and 1.194 of the new Rules of Practice and Procedure, effective August 1, 1939 (4 Fed. Reg. 3345).

abuse of its powers if it were to issue a writ of mandamus because it thought the Commission had misinterpreted its own rule of practice.

It is unnecessary to emphasize the gravity of the decision below so far as it bears on the administration of the Communications Act. Plainly the allocation of radio facilities is no less important nor less in need of the expert knowledge and understanding of the Commission merely because an appeal has been taken to the Court of Appeals and the case remanded to the Commission.

So far as the decision is of more general application, because of the close similarity of the statutes providing for judicial review of administrative orders, it raises disturbing possibilities that many administrative agencies would have to reckon with a class of persons who have gained a qualified exemption from the governing statute because, on an unrelated issue, they had secured reversal of an earlier administrative determination.

3. The present case is not an isolated example of an interference by the court below with the administrative processes of the Federal Communications Commission. In *Heitmeyer* v. *McNinch*, the Commission denied an application for a construction permit because it thought the applicant's financial qualifications inadequate. The court below reversed (95 F. (2d) 91) and the Commission set the application for hearings *de novo* with two other applica-

tions. Heitmeyer applied for a "rule to show cause," which was denied by the court below. He then sought an injunction in the District Court against the Commission's granting any other license until it had considered his application on the original record. The court below, on an appeal from denial of a motion to dismiss, on April 3, 1939, held the District Court to be without jurisdiction but indicated that a petition to the appellate court for a writ of mandamus would be a proper remedy. On May 24, 1939, it ordered, in the same appellate proceeding,[4] that mandamus issue. In *The Courier Post Publishing Co.* v. *Federal Communications Commission,* 104 F. (2d) 213, the court below reversed a decision of the Commission denying a construction permit because no need for a local station had been shown. On remand, the Commission set the application for consolidated hearing with a second application which was originally heard with that of the Courier Post, but from the denial of which no appeal had been taken. The Courier Post petitioned the court

[4] On May 25, 1939, it ordered that the papers be transferred to the original docket. On June 20, 1939, in response to a petition by the Commission that it be allowed to be heard, it suspended the order for 10 days, allowing 5 days to the Commission to file a brief and 5 days for the applicant to answer. On July 12, 1939, it denied a petition of the Commission for oral argument and for annulment of the order. A petition for certiorari will be filed on behalf of the Commission.

for mandamus which was granted on June 30, 1939.[8] The court said that to recognize the principle urged by the Commission, that the judgment of the court reached only to the matters decided and did not foreclose further administrative action, "would be to establish an arbitrary discretion on the part of the Commission which we think is not provided in or contemplated by the Act."

It is unfortunate that there is this sharp difference of opinion between the court below and the Commission. Particularly since appeals under Section 402 go only to the court below, with the result that no conflict of decisions can develop, the orderly administration of the Communications Act of 1934 seems to require that the controversy be terminated by a decision of this Court.

4. The decision below seems also to constitute a grave departure from settled principles controlling the judicial review of administrative agencies and the issuance of writs of mandamus. (a) In the first place, it is by no means certain that respondent will not be granted its construction permit even if its

[8] The petition was granted in the docket proceeding in which the applicant had originally appealed. The papers were transferred to the original docket by order of the same day. On July 11, 1939, the court vacated the order, denied the Commission's motion for oral argument, and allowed it 10 days in which to file a brief. After the brief was filed, together with a memorandum for the petitioner, the court on August 2, 1939, reaffirmed its power to issue mandamus but allowed the Commission 15 days in which to controvert facts alleged in the petition or to make further pleadings.

application were considered with the other two applications on a comparative basis. The interposition of the Court of Appeals at this stage violates "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50–51. (b) In the second place, even if the Commission in the last analysis should be held not to have power to consider the three applications on a comparative basis, it hardly can be denied that the question, at the least, is doubtful. But a writ of mandamus may be issued only if the right be clear. *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543. (c) Finally, it is settled that the issuance of a writ of mandamus is controlled by equitable considerations. *United States* v. *Dern*, 289 U. S. 352, 359. Even apart from the failure of respondent to show that it will suffer injury from the Commission's action in considering its application on a comparative basis, it should be observed that the effect of the judgment below is to give the applicant who secures a reversal on one issue a preferred status, such that other, and possibly more desirable, applications for the same facilities cannot be considered by the Commission. The Court of Appeals, acting as a court of equity in its review of Commission orders, should not in this manner contradict or qualify the statutory command that the Commission award construction

permits "if public convenience, interest or necessity will be served." See *United States* v. *Morgan,* No. 221, October Term, 1938.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

GOLDEN W. BELL,
Acting Solicitor General.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.

AUGUST 1939.

APPENDIX

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended May 20, 1937, c. 229, 50 Stat. 189:

SEC. 309 (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

* * * * *

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the

applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit

would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * *

SEC. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five

days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall, within thirty days thereafter, file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal

upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

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No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1939

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

THE POTTSVILLE BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The first opinion of the United States Court of Appeals for the District of Columbia (R. 24–29) is reported in 105 F. (2d) 36; the opinion on petitions for rehearing (R. 33) is not yet reported.

JURISDICTION

The decision of the United States Court of Appeals was entered on April 3, 1939 (R. 24), its decision on petitions for rehearing on May 5, 1939 (R. 33), and its decree on May 15, 1939 (R. 37). The petition for a writ of certiorari was filed on August 5, 1939, and granted on October 9, 1939. The jurisdiction of this Court rests

on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Commission denied respondent's application for a construction permit for a radio broadcast station on the primary ground that it was not financially responsible and on the secondary ground that its chief stockholder was not a local resident. The court below reversed on the primary ground and remanded in order that the Commission might independently consider the secondary ground. The Commission then set the application for oral argument, together with two other conflicting applications, which had been filed and heard before an examiner after the respondent's application. The question is whether the court below has power to issue a writ of mandamus to compel the Commission to reconsider respondent's application on the original record and without regard to the subsequent applications.

STATUTE INVOLVED

The applicable provisions of the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended, are printed in the Appendix, *infra*, pp. 59–67.

STATEMENT

In May 1936 the respondent filed an application for a construction permit to erect a new radiobroadcast station at Pottsville, Pennsylvania, to broadcast on the frequency of 580 kilocycles, with 250 watts power, daytime only (R. 5, 14). The Commission on July 2, 1936, having examined this application and being unable to

determine that public interest, convenience, or necessity would be served by granting it, designated it for hearing and gave notice to respondent; on August 12, 1936, the hearing date was fixed as September 30, 1936, when it was held (R. 13, 14). On August 10, 1936, the Schuylkill Broadcasting Company filed an application for a construction permit to operate in Pottsville on the same frequency as respondent (R. 13). On September 3, 1936, a request to designate the Schuylkill Broadcasting Company's application for hearing on the same day as the application of the Pottsville Broadcasting Company was filed by the Schuylkill Company and consented to by the Pottsville Broadcasting Company (R. 13–14). This petition was denied by the Commission (R. 14), but the Commission on September 8, 1936, permitted the Schuylkill Company to intervene in the hearing held on September 30, 1936, on the application of the Pottsville Broadcasting Company (R. 13). On November 5, 1936, an examiner of the Commission submitted his report, recommending that the application of the Pottsville Broadcasting Company be granted (R. 1, 15). Exceptions were filed and oral argument before the Commission requested by the Schuylkill Company on November 20, 1936. On December 1, 1936, the Commission granted the request for argument and argument was heard on January 28, 1937. On May 4, 1937, the Commission denied the application of the Pottsville Broadcasting Company, effective July 6, 1937 (R. 15).

On December 7, 1936, the Pottsville News and Radio Corporation filed an application for a construction per-

mit also requesting the same frequency in Pottsville (R. 20). On April 12, 1937, the applications of the Schuylkill Broadcasting Company and the Pottsville News and Radio Corporation were heard in a consolidated hearing (R. 15, 20). The Commission permitted respondent to appear and participate in the consolidated hearing on these applications (R. 15). On June 24. 1937, the Commission's examiner submitted his report, No. I-442, recommending that the application of the Schuylkill Company be granted for a construction permit to operate a daytime radio station at Pottsville, on the frequency 580 kilocycles, 250 watts power (R. 16).

On July 26, 1937, Pottsville Broadcasting Company filed an appeal in the court below under Section 402 (b) (1) from the order of the Commission denying its application (R. 15). Oral argument before the Commission on the Schuylkill application was indefinitely continued by the Commission, pending decision by the court below on the appeal of the Pottsville Broadcasting Company (R. 16). On May 9, 1938, the court below decided this appeal in favor of respondent (*Pottsville Broadcasting Company* v. *Federal Communications Commission*, 98 F. (2d) 288) (R. 1), on the ground that the Commission's finding that respondent was not financially qualified because subscriptions to its stock were not binding without the approval of the Pennsylvania Securities Commission was based upon an erroneous interpretation of Pennsylvania law.[1] The court below

[1] It may be noted that the error arose from the evidence given by the chief officer of the Pottsville Broadcasting Company (R. 3).

stated that it was unable to determine whether the Commission's further objection to the granting of the application, on the ground that the respondent's principal stockholder was not a local resident and not acquainted with the needs of the area proposed to be served, would have been controlling in the absence of the erroneous conclusion as to the financial responsibility of the Company (R. 1–4).

The Pottsville Broadcasting Company on May 23, 1938, requested the Commission to grant its application forthwith (R. 16). On June 9, 1938, the Commission took the following action: (1) It denied without prejudice the respondent's petition for immediate grant of its application; (2) it granted a petition of Pottsville News and Radio Corporation for oral argument on the applications of all three of the applicants for identical permits; (3) it stated that after the argument it would consider the three applications individually on a comparative basis, although not in a consolidated proceeding, and would grant the application which in the judgment of the Commission would best serve the public interest (R. 8).

Respondent on July 2, 1938, applied to the court below for the issuance of a writ of prohibition to prevent the Commission from (a) hearing argument or reargument except upon the one question of whether its application should be denied on the ground that respondent's principal stockholder was not a local resident; (b) from considering the application of petitioner on a comparative basis with other applications subsequently filed; (c) from hearing argument upon the other applications "until such time as the Commission shall have

complied with the judgment of this Court"; (d) "from taking any other procedural steps or from exercising jurisdiction herein other than as contemplated in the judgment of this Court reversing the Commission." It also asked for a writ of mandamus commanding the Commission (a) "to render a decision in this case, within a time certain to be fixed by this Court, and in conformity with the judgment heretofore rendered by this Court"; (b) to base that decision on the one question mentioned above; and (c) "to grant the application of your petitioner on this record as submitted to and considered by this Court" (R. 11).

The court below, on April 3, 1939, rendered an opinion holding the relief prayed should be granted (R. 24). On May 5, 1939, the court in a *per curiam* opinion denied a petition for rehearing (R. 33). On May 15, 1939, the court below, in response to a motion of the Commission (R. 34), entered an order for issuance of a writ of mandamus commanding the Commission (a) to set aside the order denying the request of the Pottsville Broadcasting Company for an immediate grant of its application and designating such application for hearing on a comparative basis, and (b) to hear and reconsider the application of the Pottsville Broadcasting Company on the basis of the record as originally made (R. 37). Issuance of the writ of mandamus was stayed pending the filing of a petition for a writ of certiorari (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In misinterpreting Section 402 (e) of the Communications Act of 1934, providing that "review by the court shall be limited to questions of law";

2. In holding that it could issue a writ of mandamus to control the further action of the Commission on respondent's application;

3. In holding that an appeal from the Commission should have the same effect and be governed by the same rules as an appeal from a lower federal court to an appellate court;

4. In assuming that the Commission was not conforming and would not conform fully and properly with the previous decision of the court below;

5. In misconstruing the rules of practice of the Commission, particularly Rule 106.4 applicable to the fixing of dates for hearings on conflicting applications and related matters;

6. In subordinating the interests of the public in the administration of the Communications Act of 1934 to the private interest of a particular applicant who happened to be the first to file for given facilities and also has obtained judicial review of the Commission's denial of its application;

7. In holding that the court, after entering its judgment under Section 402 (e) of the Communications Act of 1934, has authority to control the Commission's action in respect of matters not in issue before the court or included in its judgment of reversal;

8. In issuing a writ of mandamus where the petitioner had not exhausted its administrative remedies, had not shown a clear right to the relief or any threat of injury if the writ were denied, and asked relief which contradicted the statutory duty of the Commission;

9. In directing the Commission to set aside its order denying without prejudice the request of the Pottsville Broadcasting Company for immediate grant of its application, and designating this and two other competing applications for argument on the same day; and

10. In commanding the Commission to hear and reconsider the application of Pottsville Broadcasting Company on the basis of the record as originally made unless prior consent of the lower court is obtained to take some other action on the application.

SUMMARY OF ARGUMENT

I

Section 319 (a) of the Communications Act requires that the Commission grant a construction permit for a radiobroadcast station if the public interest, convenience or necessity will be served; Section 307 (a) makes a similar requirement for the subsequent grant of a station license. Notice and opportunity for hearing is required if the Commission upon examination does not decide to grant the license. The Act requires that the application be granted if it meets the statutory standard, whether or not it conflicts with outstanding permits or licenses. If the subsequent station will better serve the public interest, any outstanding conflicting authorizations must be modified or not renewed. Many factors, which the Commission must consider in each case, must shape the decision whether to hear conflicting applications simultaneously or *seriatim*, with the intention in the latter case to modify action on the first application if it should subsequently be necessary.

The Commission here determined that respondent's application, after the reversal of the Commission's earlier denial, should be considered on a comparative basis with two other conflicting applications. The court below has ordered that respondent's application be considered first, on the original record, and without regard to the other applications. But, since the Commission must grant one of these subsequent applications if it should be found to be in the public interest, the only ultimate effect of the decision below is to destroy orderly procedure in the Commission.

II

A. The court below found authority for the extraordinary relief granted respondent in Section 402 (e), which provides that the Commission shall carry out the judgment of the court and declares that the court's judgment shall be final. But the "judgment" under the express provisions of Section 402 (e) can reach only to "questions of law," which do not cover the peculiarly administrative questions of the procedure of the Commission and the grant of an application. Indeed, a specific amendment of this section, when used in the Federal Radio Act of 1927, was necessary to exclude from the court below authority such as it has undertaken here to exercise. *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266; *Radio Commission* v. *General Electric Co.*, 281 U. S. 464.

B. The decision below is as evidently in excess of the court's powers from a broader viewpoint. (1) Consideration of an application involves many difficult problems of engineering, economics, and social policy. Their solution, and the procedure by which they are to

be examined, are peculiarly administrative questions which should not—and on the record before it, cannot—be settled by the court below. (2) For the court below under the Act is authorized to exercise only judicial functions, and not to supervise the administrative action of the Commission. (3) That supervision is not necessary to enforce obedience to the judgments of the court below; its decisions reaching only to questions of law, of course, will scrupulously be followed by the Commission in subsequent proceedings.

C. The analogy drawn by the court below to its control over the action of a trial court after reversal is mistaken. (1) The Commission, exercising only administrative functions, is in a quite different position from a trial court. It does not simply decide between contesting litigants, who might appropriately be confined to the record originally made, but must affirmatively determine that the grant of an application is in the public interest; this the court below has neither authority to control nor knowledge of conflicting applications sufficient to exercise a control if given. (2) The court below, moreover, exercises an original jurisdiction under Section 402 which reaches only to the questions of law which may be brought to it by an appellant, and does not have the broad supervisory powers which it may exercise over a trial court. (3) Finally, it may be observed that the court below, in undertaking to control issues not before it on respondent's appeal, went beyond the powers it could exercise even with respect to a trial court after reversal. *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 168.

D. It is immaterial that respondent's application was the first filed. (1) The licensing provisions are designed to secure the best use of the broadcasting spectrum, not to reward the victor in a race of diligence. (2) The Commission rule of precedural convenience, that subsequently filed conflicting applications will not be set for hearing on the same day as applications already set for hearing, did not mean that the Commission either should or would necessarily take final action on the first application without considering those heard at a later day.

III

A. The court below is without jurisdiction to issue the writ of mandamus. It has no common law powers of mandamus. The statute authorizes all necessary and proper writs in connection with its appellate jurisdiction, but its jurisdiction under Section 402 is original.

B. The petition for a writ of mandamus was premature and before respondent had exhausted its administrative remedies. Until the Commission completes its consideration of the three applications respondent can point to no certain or even probable injury and quite obviously has unused administrative remedies available. The writ therefore should not have issued. *Smith* v. *Cahoon*, 283 U. S. 553, 562; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50–51.

C. Even if our argument should be less obviously correct than we believe, there can be no thought that the Commission was under a clear, ministerial duty to consider respondent's application to the exclusion of

the others. Under time-honored principles, mandamus will not lie.

D. Nor can the writ be issued consistent with the equitable principles which must control grant of this extraordinary relief. (1) There is no irreparable injury. (2) There is an adequate remedy by appeal from any denial of respondent's application. (3) A court of equity could not be justified in so completely ignoring the statutory mandate that the application be granted only to the one who will best serve the public interest. *United States* v. *Morgan*, 307 U. S. 183, 191, 194.

ARGUMENT

I

THE PROCEDURAL FRAMEWORK IN WHICH APPLICATIONS FOR CONSTRUCTION PERMITS AND BROADCAST LICENSES ARE CONSIDERED

The issues in this case can be formulated with precision only when they are placed in their proper setting —the procedure which the Commission must follow in considering applications for construction permits or radiobroadcast station licenses. We believe that the court below did not properly appreciate either the duties of the Commission under the Communications Act or the procedural consequences of those duties. For, when the procedural framework is understood, it seems evident that respondents have obtained the extraordinary relief of a writ of mandamus to gain simply a fugitive procedural advantage, which cannot prove of substantial value and which serves only to confuse the

orderly disposition of the proceedings before the Commission.

1. *In General.*—The Communications Act in Section 301, *infra,* makes it unlawful for any person to operate a radio station for broadcast or other purposes without a license granted by the Commission under the provisions of the Act. The procedure prescribed in Section 319, *infra,* for licensing new radio stations, with certain exceptions not material here, provides that an applicant for radio station license shall first make written application for a construction permit to construct the station and shall upon completion of construction apply for the actual license instrument; the Commission is required to grant the permit if public convenience, interest, or necessity will be served. Section 307 (a) of the Act, *infra,* similarly provides that the Commission shall grant an application for a radio station license if public interest, convenience, or necessity will be served thereby. Since an application for a construction permit, of course, looks equally to the grant of the application for a radio station license, the procedural provisions of Section 309 (a), which relate in terms to applications for station licenses, have uniformly been construed by the Commission as being applicable to applications for construction permits.

Section 309 (a), *infra,* provides in substance that the Commission shall examine applications, and, if such examination discloses that the public interest, convenience, or necessity would be served by the granting thereof, that it shall authorize the issuance of the

license. If the Commission, upon such an examination, determines that public interest, convenience, or necessity would be served by the granting of the application, it must grant the application and issue the license requested, notwithstanding that outstanding licenses may have to be modified or a renewal of license denied to a licensee operating a station.[2] In the event that the Commission, upon such an examination, does not determine that the granting of the application would serve public interest, convenience, or necessity, it is required to notify the applicant and accord the applicant an opportunity to be heard on the application.

The Act clearly contemplates and the Communications Commission as well as its predecessor, the Federal Radio Commission, has uniformly recognized that applicants for radio station licenses are not precluded from requesting a license to operate on a particular frequency, even though such an operation may require the denial of other pending applications or even modification of or the refusal to renew outstanding licenses.[3]

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[2] Section 312 (b) authorizes the Commission to modify an outstanding license if "in the judgment of the Commission such action on its own motion will promote the public interest, convenience, and necessity."

Section 307 (d) provides that in acting upon applications for renewal of station license the Commission shall "be limited to and governed by the same considerations and practice which affect the granting of original applications." *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, involved a refusal to renew an outstanding license because under the statute the Commission was required to grant a conflicting application.

[3] The recognition that a pending application may conflict with a renewal of an outstanding license is the reason for Section 1.362

When there are pending before the Commission applications for authorization to operate radio stations which cannot operate simultaneously because of interference to reception which would result from such an operation, there obviously arise questions as to the proper procedure to be followed by the Commission in acting upon the conflicting applications. It is evident that if the applications are considered and finally acted upon *seriatim* the action taken upon the first application may have to be set aside or modified because of the action required upon the applications subsequently considered. On the other hand, it is impossible to withhold action on any particular application until such time as all possible applications have been filed which may present questions of conflict. This follows from the fact that, under the Act, an application may be filed at any time for authorization to operate a station, without regard to the pendency of previously filed applications or to the existence of outstanding licenses or authorizations. The experience of the Commission has demonstrated that it is impossible to formulate any hard and fast rule for the handling of applications for

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of the Commission's Rules of Practice and Procedure which provides:

"SEC. 1.362. Filing directed by Commission.—Whenever the Commission regards an application for a renewal of license as essential to the proper conduct of a hearing or investigation, and specifically directs that it be filed by a date certain, such application shall be filed within the time thus specified. If the licensee fails to file such application within the prescribed time, the hearing or investigation shall proceed as if such renewal application had been received."

This rule was formerly Rule 17 of the Federal Radio Commission.

conflicting facilities which will avoid, on the one hand, the possibility of having to revise action taken on a particular application because of the filing of another application, and, on the other hand, will permit the Commission to discharge its statutory obligation to make available that radio service which will serve the public convenience, interest, or necessity.

Many considerations which vary from case to case must affect the procedural question of whether to consider pending conflicting applications separately or simultaneously. Examples are: the possibility of patent defects in one application not present in other pending applications; the possibility that conflicting applications have been filed simply to delay action by the Commission on a pending application; the adequacy of the radio service then enjoyed in the area; the likelihood that an application on file but not yet examined will offer preferable service; and the amount of delay that will result from a simultaneous comparative consideration. The Commission has deemed such varying considerations to require different procedures in different cases, in order that it should "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice" (Section 4 (j), *infra*). The one constant factor in all such cases is the requirement that the Commission must act upon every application filed, and must in its action on the application grant or deny as required by the statutory criteria, even though a grant may require modification of its action on a previously considered application. Whether it acts first upon one of several conflicting

applications is unimportant in the long run, although in a particular case it may be important, because of an existing need for service to a particular community, to act as promptly as possible to provide service to that community.

2. *The Commission's Order of June 9, 1938.*—In May, 1937, the Commission had before it respondent's application on which a hearing had been held and argument heard by the Commission. It also had pending before it applications of Schuylkill Broadcasting Company and Pottsville News and Radio Company requesting the same facilities as respondent. These latter two applications were not at that time ready for final Commission action. Since it appeared to the Commission that respondent's application should be denied, it acted at that time to deny the application and did not delay action for possible comparative consideration with the Schuylkill and Pottsville News and Radio applications. Obviously, in the view the Commission took of respondent's application, needless delay in denying the application would not have been warranted. But when respondent took an appeal from the Commission's denial of its application, the Commission deferred further consideration of the other two applications, pending the outcome of the appeal. This was desirable because, if the Court found the Commission to have been wrong in denying respondent's application, a comparative consideration of its application and the other two applications might prove appropriate, as the Commission in fact later found it to be. After the court gave judgment for respondent in its appeal from the

Commission's denial of its application, the Commission ordered an argument on all three applications and announced that it would consider them at the same time on a comparative basis.

The Commission considered it to be better procedure to decide at one time the question of which, if any, of the three applications, all then being ready for final Commission action, should be granted, rather than acting upon them *seriatim*. A *seriatim* consideration of the applications did not appear advisable in view of the fact that the applications were all ready for final action and granting of any one of them before a consideration and determination on the other two might be abortive, because without consideration of all three, the question of which one would best serve public interest, convenience or necessity could not be answered. Since the three applications pending before the Commission requested the same facilities, this basic question must in fact be answered upon a comparative basis whether the three applications are considered simultaneously or *seriatim*.

3. *The Court's Order of May 15, 1939.*—The order of the court below commands the Commission to set aside its order designating the three applications for a hearing on a comparative basis, and to consider respondent's application on the record as originally made (R. 37). This means that respondent's application must be considered without regard to the application of Schuylkill and Pottsville News and Radio, and, further, that the Commission is not to consider those applications until after it has acted on respondent's applica-

tion. The court's order does not relieve the Commission of the necessity of considering at some later date the applications of Schuylkill and Pottsville News and Radio, nor does it excuse the Commission from the performance of its statutory duty with respect to the two other applications, even though that duty would require that one of them be granted. Should the three applications be handled as directed by the court below, and should the Commission (shutting its eyes to the other two applications) be required under the statute to grant respondent's application for a construction permit, it might very well be required at a later date, on consideration of the other two pending applications, to grant one of them notwithstanding that such a grant would preclude respondent from ever getting a station license.

It will thus be seen that the order of the court below in no way relates to any substantive rights respondent may have in connection with its application. The court's order of May 15, in final analysis, goes solely to the question of whether the Commission should give simultaneous or *seriatim* consideration to respondent's application and the other pending applications. The court could not and did not undertake to determine that a construction permit should be issued to respondent, much less that a station license should be issued to it or that the applications of Schuylkill and Pottsville News and Radio should be denied. The only effect of the order is to require *seriatim* consideration of the applications. The Commission has determined, and common sense indicates, that the more orderly pro-

cedure would be to consider the three applications at one time, on a comparative basis. The succeeding portions of this brief will show, we believe, that the court had no power to impose a contrary procedural requirement upon the Commission.

II

THE COURT BELOW HAS NO AUTHORITY TO DIRECT THE PROCEDURE TO BE FOLLOWED BY THE COMMISSION

The court below did not undertake to prescribe any general rule that conflicting applications must always be considered *seriatim* rather than simultaneously, on a comparative basis. Its decision reaches only to cases where one of the applications has been denied by the Commission and where the denial has been reversed by the court below. In those circumstances, the court below held, "it is the duty of the Commission to comply with that order and, unless for some exceptional reason it obtains leave of this court to reopen the case, to reconsider the matter on the record and in the light of this court's opinion" (R. 29), and that the Commission's determination "should be on the record originally considered" (R. 33). It emphasized that in this case it had remanded the case for consideration of one question and one question alone, the necessity of local residence of respondent's principal stockholder. The Commission's order setting the application for hearing on a comparative basis was thus viewed as a violation of the court's judgment of reversal.

The authority so to restrict the issues and the record to be considered by the Commission in subsequent proceedings, and to control its procedure, was found by the

court below either in the terms of Section 402 of the Act, *infra,* or by analogy to the supposed control over proceedings after reversal of a trial court. We shall show (a) that Section 402 grants no such authority, (b) that its exercise is a forbidden invasion of the administrative field of action, (c) that the argument based upon the analogy to the Court's control of a trial court is faulty, and (d) that it is immaterial that respondent filed the first of the conflicting applications.

A. Section 402 (e)

In addition to the remedies existing at common law or by statute (Section 414, *infra*) for invasion of legal or equitable rights by unlawful action, Section 402 of the Communications Act of 1934, *infra,* provides special remedies. Section 402 (a) provides that the provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission by a three-judge district court are applicable in suits to enforce or set aside any order of the Commission, with the exception of certain specified orders. These excepted orders are those "granting or refusing an application for construction permit for a radio station or for a radio station license, or for renewal of an existing radio station license, or for modification of existing radio station license, or suspending a radio operator's license." Subdivisions (b) to (f) of Section 402 prescribe the manner in which a suit shall be brought in cases involving an invasion of legal or equitable rights by such orders. The court below is the only court upon which jurisdiction has been conferred by these subdivisions.

Section 402 (b) provides for an appeal to the court below by, *inter alios,* an applicant for a construction permit or for a station license whose application has been refused. Section 402 (e) provides as follows:

> At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari. * * *

The court below did not specify which provision of Section 402 (e) was understood to give it authority to direct the Commission to consider respondent's application on the same record and without comparison with other applications. However, it quoted (R. 26) the clauses (1) authorizing remand to the Commission "to carry out the judgment of the court" and (2) declaring that "the court's judgment shall be final."

Neither provision justifies the view of the court below as to the consequences of its reversal. Under each of the clauses the first inquiry must be directed to what

is "the judgment" of the court. Only if the judgment includes the subsequent procedure of the Commission in its scope can Section 402 (e) authorize control of those proceedings. It seems plain enough that Section 402 (e) does not contemplate a judgment which reaches so far. For Section 402 (e) also provides that "the review by the court shall be limited to questions of law." Under no view could the Commission's procedure in considering conflicting applications, whether *seriatim* or on a single hearing, be said to constitute a "question of law" decided by the court below on respondent's appeal. Its authority under Section 402 (e) is limited by Section 402 (b) to the refusal of an application for a construction permit or station license (or for its renewal or modification). The procedure by which the application will be considered is, subject to statutory limits, committed by Sections 4 (f) and 309 (a) to the control of the Commission alone.

If, as respondent has urged (see R. 32), the court below has in effect determined that the Commission must grant respondent's application (if it determines that local residence of the chief stockholder is not necessary), the case becomes even clearer. The grant of a construction permit must be done by the Commission, not by the judgment of the court below. Whether issuance of the construction permit, or of the subsequent station license, will serve the public interest, convenience or necessity involves many considerations, only one of which presented the "question of law" decided by the court below. Specifically, the Commission must consider the legal and technical qualifications of

the applicant, the need for the station, the electrical interference with other stations, the type of radio service contemplated by the applicant, the comparative desirability as between conflicting applications, the financial responsibility of the applicant, the adequacy of the proposed engineering equipment, and the like. These questions were in no way involved in or determined by the decision of the court below. In this case, it is true, the Commission determined that there was need for a station and that the proposed engineering equipment was adequate (R. 2, 27), and erroneously determined that respondent was not financially responsible. But even if these factors, not necessary to the decision of the Commission, were not to be reexamined,[4] there yet remains the question of the comparative desirability of respondent's proposed radio service. Determination of this issue is not the "question of law" which was decided below; the judgment of the court which is final and is to be carried out by the Commission cannot include matters which were not before the court and which it, therefore, could not and did not decide.

It seems plain, then, that Section 402 does not authorize the court below to exercise a general control over the proceedings of the Commission subsequent to a reversal by that court. If there could be doubt, it would be removed by the exceptionally clear history of Section 402. The predecessor of that section is Section 16 of the Radio Act of 1927, *infra*, which provided that

[4] There is no need to consider whether these points could be reexamined if it appeared necessary for the Commission to do so; for the action taken by the Commission on June 9, 1938, indicated no intention on the part of the Commission to do so.

the court below might "alter or revise the decision appealed from and enter such judgment as to it may seem just." In *Radio Commission* v. *General Electric Co.*, 281 U. S. 464, the Court held that it had no jurisdiction to review a judgment of the court below directing the Commission to renew a license upon the terms found in the expiring license. The Court held that Section 16 "does no more than make that court a superior and revising agency in the same field" (p. 467). It resulted that the decision of the court below was not a judicial decision and could not be reviewed upon writ of certiorari.

The paragraph in Section 16 was thereupon amended,[5] to a form identical to the present Section 402 (e) of the Communications Act. In *Radio Commission* v. *Nelson Brothers*, 289 U. S. 266, the Court held that the amended Act contemplated a judicial judgment by the Court of Appeals, so that this Court had jurisdiction to review. The limitations upon the power of the court below which are found in the amended section, this Court said (p. 276), are "in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review."

The court below has partially recognized the statutory mandate that it confine its action to the judicial

[5] C. 788, 46 Stat. 844. The Committee Reports simply confirm the obvious purposes of the bill. See H. Rpt. No. 1665, Sen. Rpt. No. 1105, 71st Cong., 2d Sess.

function of deciding questions of law. If there has been no appeal to the court under Section 402, it will not undertake to dictate the procedure to be followed by the Commission or to prescribe the record upon which it must consider applications. *Black River Valley Broadcasts, Inc.* v. *McNinch,* 101 F. (2d) 235; 69 App. D. C. 311, certiorari denied, 307 U. S. 623. But it is evidently of the opinion that Section 402, to ensure obedience to its decisions, gives it power to exercise this supervision in cases where it has reversed the Commission's decision upon a question of law. But this possibility, too, has already been foreclosed by this Court. In considering the scope of Section 16, the same as Section 402 in this respect, the opinion in *Radio Commission* v. *Nelson Brothers, supra,* 278, unequivocally states:

> The provision that, in case the Court reverses the decision of the Commission, "it shall remand the case to the Commission to carry out the judgment of the Court" means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law. * * *

There is no suggestion that the Commission in this case proposed to depart from the ruling of the court below as to the Commission's reason for disputing the financial responsibility of respondent. It merely set the application for the "further action" approved by this Court, in which it cannot be thought that the Commission will not scrupulously "respect and follow the Court's determination of the questions of law."

It thus seems plain enough that Section 402 (e) gives the court below no general authority, simply because

it has reversed the Commission upon a question of law, to control the subsequent proceedings in the Commission. Further proof, if it be needed, is found in *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364. There the Court affirmed a decision granting the petition of the Board for a remand before argument in order that it might correct possible procedural defects. The provisions governing review are, broadly speaking, similar in the Communications and the National Labor Relations Acts. The *Ford* decision, while distinguishable in that the Board itself moved for remand before argument, was reached because a similar course would be followed if the court itself were to reverse and remand the cause. The Court said (p. 374):

> The "remand" does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law. See *Federal Radio Comm'n.* v. *Nelson Brothers Co.,* 289 U. S. 266, 278.
>
> Such a remand does not dismiss or terminate the administrative proceeding. * * *

Indeed, no other rule would be possible under long settled principles governing the permissible scope of judicial review of administrative agencies. The reversal by the court is restricted to the questions of law which it was authorized to decide; in subsequent proceedings the administrative agency is not, because it erred in the decision of one question of law, foreclosed from exercising its statutory powers and duties in the decision of other questions of law and fact. See

Southern Ry Co. v. *St. Louis Hay Co.*, 214 U. S. 297, 302; *Florida* v. *United States*, 282 U. S. 194, 215; 292 U. S. 1; *United States* v. *Morgan*, 307 U. S. 183; *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47, 48–49 (C. C. A. 6th), certiorari denied, 273 U. S. 717; *Ohio Leather Co.* v. *Federal Trade Commission*, 45 F. (2d) 39, 42 (C. C. A. 6th); *Brotherhood of R. R. Trainmen* v. *National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.).

B. The Decision Below Invades the Administrative Field

Section 402, we have shown, not only fails to supply authority for the writ of mandamus issued below, but it contains an affirmative prohibition against exercise of a power which goes so far beyond the questions of law which alone may be decided by the court. The same result is compelled if one approaches the issue along a broader front. Basic considerations of the division of governmental powers between administrative agencies and reviewing courts point equally to the necessity that the Commission be free to perform its administrative duties after as well as before it has been reversed on a question of law by the court below. At the cost of some duplication of the discussion of Section 402, it seems worthwhile to explore the more general implications of the decision of the court below.

1. *Consideration of an Application is an Administrative Function.*—It is unnecessary to expand the self-evident proposition that the Commission, in considering an application for a construction permit or a station license, is performing a peculiarly administrative func-

tion. *Radio Commission* v. *General Electric Co.*, 281 U. S. 464. As this Court declared in *Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 276:

> Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. * * *

Nor can it be necessary to elaborate the motives which led Congress to commit decision of these questions to an expert body "for the use of that enlightened judgment which the Commission by training and experience is qualified to form" (*Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286). The consideration of an application for a construction permit or station license often involves decision upon uncommonly complicated and diverse problems. The judgment of engineers is required to determine the adequacy of equipment and the interference which the proposed station may present with respect to the broadcasts of other stations. The judgment of accountants and financial experts is needed to ensure that a portion of the radio broadcast spectrum is not being appropriated by an applicant who is financially irresponsible or whose probable revenues are so insufficient that the venture cannot be sanctioned. Wisdom and restraint, born of experience, should combine to assure the people of the best available radio service and yet not stifle freedom of expression. While no body of men can be expected

always to decide these questions wisely, the nature of the radio broadcast field is such that the questions must in every case be answered; there must be choice among competing applicants for a given frequency, and there must be a limitation upon the scope of the operations of those licensed.

Congress created first the Federal Radio Commission and then the Federal Communications Commission to exercise the discriminating selection and regulation which is required if the broadcasting industry were not to be reduced to a self-defeating anarchy. Its decisions, by their very nature, require the expert judgment of administrative officers, who must fill out the statutory framework and extend the broad legislative direction to countless specific cases.

Under the decision of the court below, the Commission is forbidden to exercise the administrative duties which have been conferred on it by Congress. We have shown (*supra,* pp. 12–20) that in the final analysis the only practical effect of the decision is to require the Commission to consider the three applications *seriatim,* rather than together, because even if respondent's application for a construction permit were granted the Commission under the Act could not refuse a better qualified applicant simply because this would require refusal of respondent's station license. But even in this light there has been imposed on the Commission an extensive control of its purely administrative functions, both as to its procedure and as to its substantive consideration of respondent's application.

We have shown (*supra*, pp. 16–17) that many factors must influence the Commission's decision whether to hear conflicting applications *seriatim* or simultaneously. Few, if any, of these factors could have been known to the court below from the record presented to it on respondent's appeal; none could have afforded it a legitimate occasion, in disposing of that appeal, to undertake to prescribe the procedural details by which the Commission would accomplish its statutory duty to dispose of all three of the applications.

There would be no contention that respondent, or any of the other applicants, could appeal from the order setting the applications for a single hearing on a comparative basis, for Section 402 (b) authorizes appeal only from a refusal of the application. By the same token, there could be no power in the court to accomplish the same result by writ of mandamus. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375.

If the purpose of the writ was, as respondent seems to believe, less to control the procedural details of the Commission's action than to ensure that the respondent be granted a construction permit to the exclusion of the other applicants,* the administrative nature of the functions thus controlled is even clearer. The Commission and not the court is to determine which of conflicting applications will best serve the public interest (*Radio Commission* v. *Nelson Brothers Co., supra*); even if the necessary information as to the other appli-

* Subject, of course, to the Commission's decision as to the effect of the nonresidence of respondent's chief stockholder, which was expressly left open by the opinion of the court below on the appeal (R. 4).

cations had been before the court below, resolution of the difficult engineering, economic, social, and other problems which must be faced before choice is made is exclusively an administrative function.

2. *The Act Commits Only Judicial Functions to the Court Below.*—The process of granting applications for construction permits and station licenses is, then, a purely administrative function. But acts done in the performance of this administrative process may result in controversies appropriate for judicial decision. Such controversies may involve questions arising in response to contentions: (a) that the Commission has misinterpreted the statutory definition of its duties or the limits of its authority; (b) that it has erroneously decided a question of general law; (c) that its procedure did not satisfy the requirements of the statute or of due process; or (d) that the Commission has found facts without any substantial supporting evidence. See *Radio Commission* v. *Nelson Brothers Co., supra,* 276–277. These, and these alone, are judicial questions.

After the amendment to Section 16 of the Federal Radio Act, the court below was authorized on appeal under that section, or under Section 402 of the Communications Act, to decide only judicial questions (see *supra,* p. 25). It is, therefore, unnecessary to explore the interesting question of whether the court could constitutionally be authorized to do more.[1]

[1] The courts of the District of Columbia, after the decision in *O'Donoghue* v. *United States,* 289 U. S. 516, must be taken to serve as Article III courts as well as courts created for the government of the District of Columbia. The constitutional objec-

Since the effect of the writ of mandamus issued by the court below is to direct the manner of performance of administrative functions, and since it has jurisdiction only to perform the judicial function of deciding questions of law, its judgment seems of necessity to be wrong.

3. *The Effect of the Appeal Under Section 402.*—We do not understand the court below to have controverted these basic principles. It issued the writ of mandamus not on the ground that it had an independent power to control the administrative functions of the Commission but on the theory that such control as it exercised was necessary to preserve the full force of its own judgment of reversal (see R. 29). This is made clearer in the similar decision in *Carrier Post Publishing Co.* v. *Federal Communications Commission*, not yet reported,

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tion to vesting federal executive or legislative functions in a court exercising the judicial power defined by Article III rests on the doctrine of separation of powers. If *federal* executive or legislative functions were given to the District of Columbia courts, which also exercise the Article III judicial function, a commingling of executive or legislative with judicial federal governmental powers would result. The policy of the prohibition against placing any two of these functions in the same hands would cast doubt on the constitutionality of any attempt to achieve this result. There would, on the other hand, be no such objection to adding *District of Columbia* executive or legislative powers, which would involve no coalescence of federal powers into the hands of a single body. Under this view, supported more by logic than by precedent; the *O'Donoghue* case served to overrule dicta in *Postum Cereal Co.* v. *Calif. Fig Nut Co.*, 272 U. S. 693, and *Radio Commission* v. *General Electric Co.*, 281 U. S. 464.

decided June 30, 1939,* than in the present case. In the *Courier Post* opinion, delivered *per curiam*, the court said:

> we think the Commission is wrong in joining in its order for rehearing with petitioner's application, stations which had not applied for radio licenses up to the time petitioner's case was heard by the Commission. If a different view prevails, an appeal to this court would be a futile gesture, and there would be no termination to proceedings of this character. The provisions of the Act make our decision final, and the Commission should proceed in accordance with its terms. * * * no application has been made to us to reopen the case, the Commission taking the position here, as before, that we have no right or authority to direct it in any respect as to what it shall do after our decision is rendered, except to the extent that it shall undo what we have condemned on appeal. To recognize this principle, would be to establish an arbitrary discretion on the part of the Commission which we think is not provided in or contemplated by the Act.

The court below, therefore, seems to feel that, if the Commission after a reversal were allowed to go about its statutory duties in connection with applications for construction permits or station licenses, an appeal would become "a futile gesture" and there would be established "an arbitrary discretion on the part of the

* Judgment has not yet been entered. On August 2, 1939, after various intervening motions, the court reaffirmed the decision of June 30, 1939, but allowed the Commission 15 days in which to controvert facts alleged or to make further pleadings. The Commission on August 19, 1939, filed a memorandum disclaiming desire to do either. No further order has been entered in the case.

Commission." Even if these fears had substance, they would not justify the assumption by the court below of powers not given it by Congress. But it seems plain enough that the fears are quite unjustified.

To illustrate with the case at bar, respondent's appeal to the court below was, very obviously, not a futile gesture. Its application had been denied by the Commission because of a decision that financial responsibility had not been shown. The reversal by the court below has resulted in the Commission restoring respondent's application to the docket, for consideration together with those of Schuylkill and Pottsville News and Radio. Neither the court below nor respondent has suggested that the Commission proposes to disregard the ruling of that court, and in the subsequent proceedings there will of course be no question but that consent of the Pennsylvania Commission to the security issuance will be irrelevant to respondent's financial responsibility. If respondent should be granted a permit, the appeal will have served its entire purpose.

If, on the other hand, the Commission should determine that public interest, convenience, or necessity required that the application of Schuylkill or Pottsville Radio and News should be granted, petitioner would ultimately gain nothing by its appeal. But its futility would be traced, not to the Commission procedure, but to the deficiencies, absolute or comparative, of respondent's application. The court below did not undertake to determine that respondent rather than the competing applicants was entitled to a construction permit. If the Commission, going beyond the court's decision, were to ignore the conflicting applications and to grant re-

spondent's application because the Commission had declared respondent financially irresponsible on erroneous grounds, its action might be a graceful gesture, but it hardly would be compliance with Sections 319 (a) and 309 (a) of the Communications Act. Certainly Schuylkill and Pottsville Radio and News could make a forceful case on appeal from any denial of their applications which was made necessary by a grant of respondent's application simply because of contrition for past error.

The second ground advanced in the *Courier Post* opinion was the court's belief that to sanction further proceedings, in connection with other applications, would be "to establish an arbitrary discretion on the part of the Commission." We do not see that the determination of questions not considered by the court below, and which must under the statute be determined before the license is issued, can be said to be an "arbitrary discretion." Certainly the discretion, and the possibility of its arbitrary exercise, are no less when the Commission examines the applications before there has been an appeal to the court below. Yet we are confident that the court, in making a charge of this gravity, did not mean to imply that the Commission would act in a more arbitrary manner as a result of having the benefit of the opinion of that court on one of the several questions involved.

In truth, the effect of a reversal under Section 402 can be no more than a conclusive determination of the appealed questions of law which arise in the consideration of applications for construction permits or station licenses. The court below has no authority to

supervise the administrative function; applications can be granted only on the Commission's determination and not on the judgment of the court below. Even if it had the authority, we are at a loss to see how the court below, which could not have before it the factual and administrative considerations which led the Commission to set the three applications for a joint hearing, could undertake to forbid the Commission to do so. It could not, therefore, have been passing judgment on the efficiency or the economy of that procedure. Yet it could hardly have meant that the Commission was to deny the applications of Schuylkill and Pottsville Radio and News simply because it had erroneously determined respondent not to have shown financial responsibility. Not only, then, does the decision below seem an extraordinary invasion of the administrative powers vested in the Commission, not only does it seem to fly in the face of Sections 309, 319, and 402 of the Act, but it does not seem a sensible way to accomplish any purpose which can reasonably be ascribed to the court below.

C. The Analogy to Review of a Trial Court is Mistaken

The court below, we submit, reached a conclusion which is at war with the terms of the statute, with the necessary demarcation between judicial and administrative functions, and with common sense. It was led into this error, in part at least, because of an unquestioning assumption that its powers and duties on review of a refusal by the Commission to grant a permit or license were coextensive, in nature and in scope, with its power to review the decisions of the District Court

for the District of Columbia.* This assumption: (1) ignores the differences between the functions of the Commission and those of a trial court; (2) mistakes the character of the jurisdiction and powers of the court under Section 402; and (3) even if the analogy be accepted, ascribes too narrow a field of action to the trial court itself.

1. *The Contrasting Functions of the Commission and a Trial Court.*—There is no occasion to labor the point that the Commission exercises only administrative functions, the trial court only judicial functions. It should, however, be emphasized that lying behind this terminology are many differences in function which demonstrate the impropriety of a supervision so confining as that undertaken by the court below.

We have shown (*supra*, pp 29–30) that the Commission's consideration of an application for a construction permit or a station license requires the solution of a number of engineering, economic, social, and other problems. Even if there be but a single applicant, the Commission must weigh the relevant factors and reach a decision whether the grant of the application would be in the public interest, necessity, or convenience. Its duty is not the choice between the conflicting contentions of opposed parties, but the investigation and de-

* It said (R. 27): "We have no doubt that as far as is practicable the order of the Court entered on an appeal from the Commission ought to have the same effect and be governed by the same rules as apply in appeals from a lower federal court to an appellate federal court in an equity proceeding. The rule in such cases is stated in *Sanford Fork & Tool Co.*, Petitioners, 160 U. S. 247, restated *In re Potts*, 166 U. S. 263, and confirmed in *D. L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1."

termination of factors bearing upon the public interest. When conflicting applications are before the Commission, its decision may often involve the choice between opposing contentions but its basic duty remains the same: it must affirmatively conclude, before it grants an application, not alone that one applicant has made the better case, but that his application is in the public interest, convenience, or necessity.

This duty, it may be observed, does not vanish because an applicant on appeal has secured a reversal on a question of law involved in the proceeding. Then, as in the original proceeding, the Commission must obey the statutory command that the application which best serves the public interest be granted. Then, as before the appeal, the Commission cannot grant an application unless satisfied that from every viewpoint—engineering, economic and social—construction and operation of the station would serve the public interest, convenience or necessity.

There are, it is true, procedural protections for the applicants which in many instances will offer analogies to judicial procedure. If the Commission, upon examination of an application, determines that the public interest will be served by its grant, no further proceedings are necessary. But, if it does not reach such a conclusion, Section 309 (a) directs that the Commission, upon notice to the applicant, shall afford an opportunity for hearing on the question. At these hearings, of course, the applicant and interveners may appear by counsel, introduce evidence, submit proposed findings, and argue their case before the Commission.

But these procedural similarities to a judicial proceeding do not alter the quite evident facts that the Commission's function remains the discharge of administrative functions under the Act, that its role is not to decide between contesting litigants but to determine whether any given applicant meets the statutory requirements, and that its procedural framework for investigating these questions must of necessity be shaped by that function.

Thus, it may be assumed that litigants before a trial court should have but one opportunity to make their record and that a reversal for errors of law should afford no occasion for reopening the record in order that the appellee might try again. The judicial function is to determine, as expeditiously as possible, controversies between opposing parties. But this is wholly without application to the duties of the Commission under Sections 309 and 319, which are not to choose between contestants but to satisfy itself that the permit or license will serve the public interest. If a litigant errs on one question of law, there might be occasion for deciding the entire case against him, so long as it be determinative on the record before the appellate court. But, if the Commission errs on a question of law, the case cannot be decided "against" it. It is not a party contesting for property, money, or some privilege. It is an administrative body which alone can determine if an application is in the public interest. If it errs on a question of law, its conclusion on that issue can and should be corrected. But *non constat* that the court can control the Commission's decision on other factors, not

challenged as erroneous in law, the determination of which is committed by the Act to the Commission.

In this we have assumed that the court below did in truth have before it the evidence available to the Commission. But the present case is even clearer, for the court could not possibly know either the factors which led the Commission to direct a joint hearing of the conflicting applications or the terms of the competing applications. Under these circumstances, to apply the analogy of reversal of a trial court and to confine the Commission's consideration to a single application on the original record is patently unwarranted.

Indeed, if one were seeking judicial analogies, it would be easy to postulate much closer cases than those cited by the court below from which to reason. If, for one example, the court below reversed a trial court in dismissing as unfounded a claim filed in a bankruptcy proceeding, it would hardly direct that the trustee, as penalty for the error, pay in full without regard to the claims of others, nor would it deny the referee power to hear evidence on the proper amount of the claim.

2. *The Nature of the Review under Section 402.*— But even if the Commission did in fact function in a manner closely similar to that of a trial court, there would remain a further obstacle to a correspondingly minute supervision by the court below. This is the markedly different nature of the functions and powers of the court under Section 402 and those it exercises in review of a trial court.

In the first place, the "appeal" of which Section 402 speaks is not an appeal at all. It is an original pro-

ceeding, instituted by the "Appeal and Statement of the Reasons Therefor" provided by Section 402 (c). The administrative investigation by the Commission does not constitute a case or controversy; that arises for the first time when the aggrieved applicant sues the Commission in the court below. *Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 275–278; see *Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 469; cf. *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U. S. 716, 722–728; *United States* v. *Ritchie*, 17 How. 525, 534; *Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45, 46–47 (C. C. A. 8th); *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752, 753 (C. C. A. 6th); *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615, 618 (C. C. A. 2d), certiorari denied, 277 U. S. 598; *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910 (C. C. A. 2d), certiorari denied, 267 U. S. 602; *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2d), certiorari denied, 278 U. S. 623.

The effect of Section 402 is to give the court below a special jurisdiction and to formalize the procedure. But the proceeding is in essence an action against the Commission, to obtain relief against arbitrary or illegal action. It is substantially the same sort of proceeding which would arise in the absence of statute, if one asserted the right to relief by injunction against an invasion of his legal or equitable rights by the Commission. As this Court said in *Radio Commission* v. *Nelson Brothers Co.*, *supra*, 277:

> If the questions of law thus presented were brought before the Court by suit to restrain the

> enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercized on an authorized appeal from the decision of an administrative body. We must not "be misled by a name, but look to the substance and intent of the proceeding."

In this proceeding, the court below is limited in its inquiry to questions of law: whether the Commission has applied an erroneous rule of law, whether its procedure is defective, and whether there is evidence to support its findings of fact. (*supra*, p. 32). It has no authority to search the record or to determine that an application should be granted; it has no power to prescribe the decision or the procedure of the Commission after its error on a question of law has been corrected.

In the case of an appeal from the District Court, however, the court below is possessed of a much broader authority. It stands, subject to familiar canons limiting the scope of review, in the place of the trial court and the single question is whether the trial court erred. Apart from the complications of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, it has full power to direct the trial court to enter the judgment and dispose of the case as the appellate court thinks right.

There is neither anomaly nor impropriety in this pervasive supervision of the action of the trial court; each court exercises a judicial function, the questions for

decision are, of course, as susceptible of correct determination by the appellate as by the trial court, and the appellate court acts on a record containing all the circumstances before the trial court. But in entertaining a proceeding under Section 402, the position of the court below is no way comparable to that when it hears an appeal from the District Court. In the exercise of its judicial function it can adjudicate only those questions of law raised in challenging the Commission's action in the performance of its executive or administrative function; it may be supposed not to have the expert assistance which must lie back of the Commission's decision on the many factors not presented to the court; and, certainly in the case where a record involving only one of conflicting applications is before it, the court has only a fragmentary part of the record which must ultimately guide the grant of one application.

We submit, therefore, that even if the writ of mandamus had been appropriate if issued to the District Court, the court below was entirely without warrant in its assumption that it possessed an analogous supervisory power over the administrative functions of the Commission.

3. *Even Were the Analogy Accurate, issuance of the Writ of Mandamus is Unwarranted.*—There remains a final comment on this basis of the decision below: even on the assumption that Section 402 gives the court an authority over the Commission which is precisely comparable to its power over a trial court, the issuance of the writ of mandamus shows a mistaken notion of the effect of a judgment of reversal. The comment is irrelevant, since the powers of the court are in

no way comparable in the two types of proceedings. But it seems worth the making, if only to point more sharply the extent of the authority which the court below has assumed to exercise over the Commission.

The appeal filed by respondent is not contained in the present record. But the Act and the decision of this Court in *Radio Commission* v. *Nelson Brothers Co., supra,* alike make plain the maximum scope of the issues before the court below. It could decide only questions of law (*supra,* p. 32). It could not determine whether the application should be granted; it could not determine which of the three pending applications would best serve the public interest; it could not determine whether the Commission should hold a joint or separate hearings; and it could not determine the type of record which the Commission should have before it in the performance of its statutory duties. These questions, peculiarly administrative in nature, could not have been before the court. Its opinion on the appeal does not profess to deal with these questions. The only two issues which it considered were the financial responsibility of the respondent and the effect of the nonresidence of its chief stockholder [10] (R. 1–4).

Accordingly, even if the Commission were subject to the same control as a trial court, settled principles of

[10] The court noted that the Commission had found need of a local station in Pottsville, and sufficient financial patronage and local talent (R. 2). It is unnecessary to consider any contention that these questions are now foreclosed to the Commission, since the Commission is not proposing to reexamine them but to inquire into the comparative value of the radio service offered by the three applicants, which has not been determined by the Commission.

appellate practice show that there can be no warrant for issuance of a writ of mandamus to forbid hearing the applications on a comparative basis. For the effect of a decision of the appellate court is simply to foreclose the issues which were before it. "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 168. See also *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256, 259; *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553–554; *Ex parte Century Co.*, 305 U. S. 354. The court below chose to rely upon dicta in the *Sanford Fork & Tool* case and the decision in *In re Potts*, 166 U. S. 263, where the mandate of the appellate court disposed of the entire case; this plainly cannot be the case here.

D. It Is Immaterial That Respondent's Application Was First Filed

The lower court seems also to have been influenced by the fact that respondent "was first in the field" by presenting its application to the Commission before the other applicants for the same facilities (R. 29). And it also emphasized the Commission Rule that conflicting applications filed after a hearing had been set would not be heard on the same day (R. 29). It based its decision upon neither consideration, but it may be well to dispose of any suggestion that either factor is relevant to the issues raised by the decision below.

1. *Priority of Application.*—Section 319 (a) very plainly requires that the Commission grant a construction permit to the best qualified applicant, not to the

first to file his application with the Commission. The licensing provisions of the Act are designed to secure the best use of the limited broadcasting facilities which are available and not to reward the victor in a race of diligence. It is significant that this Court in *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, affirmed a decision of the Radio Commission which terminated the license of a station already in existence and rendering satisfactory service in order to permit another station to render a service which the Commission found would better serve the public interest, convenience, and necessity.

Indeed, the court below, prior to its action in the present case, has recognized that controversies between applicants should not be decided "on the mere question of priority of application," but rather "on the basic standard which Congress has directed shall apply, namely, the public interest, convenience, and necessity." *Symons Broadcasting Co.* v. *Federal Radio Commission*, 64 F. (2d) 381, 62 App. D. C. 46.

2. *The Commission Rule.*—The Commission Rules of Practice provide that "the Commission will, so far as practicable, endeavor to fix the same date * * * for hearings on all applications which * * * present conflicting claims * * * excepting, however, applications filed after any such application has been designated for hearing."[11] The excepting clause in this rule

[11] Rule 106.4, quoted by the court below. This rule has been superseded by Section 1.193 of the Commission's Rules of Practice and Procedure, effective August 1, 1939 (4 Federal Register 3345), declaring that the Commission so far as practicable will set conflicting applications for hearing on the same day.

of procedure seems to have been read by the court below as giving an absolute right of priority of consideration to applicants whose applications have been set for hearing before other applications are filed. But the rule, as the Commission urged in the court below and has consistently interpreted it,[12] merely provides, in the interests of avoiding undue delay, that a newly filed application will not ordinarily be set for hearing on the same date as those already set for hearing,[13] and has no bearing upon the order in which applications will finally be acted upon by the Commission. Had the Commission, when it first considered respondent's application on the record originally made, determined that the application might be granted and was not fatally defective, it might have held up final action on respondent's application until the applications of Schuylkill Broadcasting Company and Pottsville News and Radio Corporation were also ready for final action. Such a sensible procedure would have been wholly consistent with the Commission's Rule 106.4, and not in violation of any provisions of statute, rule, or regulation. *J. T. Ward* v. *Federal Communications Commission,* not yet reported,

[12] It is, of course, settled that administrative agencies have the inherent power to interpret their own rules, *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 295, and that their interpretation should be controlling unless beyond the bounds of reason. *American Telephone & Telegraph Company* v. *United States*, 299 U. S. 232.

[13] Examination of an application is a process sometimes requiring several months for completion and it would be undesirable to postpone for so long hearings which had already been set, and as to which the examination had already been completed.

decided by the Court below on November 13, 1939; cf. *Colonial Broadcasters* v. *Federal Communications Commission*, 105 F.(2d) 781 (App. D. C.).

After the court below entered judgment reversing the Commission's denial of respondent's application and remanded the case to the Commission for further consideration, neither Rule 106.4, nor any other rule of the Commission, nor any provision of the statute, entitled respondent to a prior noncomparative consideration of its application. The Court intimated in its opinion that unless such priority was afforded respondent it would, after its successful appeal under Section 402 (b) "be put in any worse position than it occupied on the original hearing" (R. 29). It is clear, however, that respondent, before its application was denied, was not in a position to demand that its application be acted upon finally before consideration was given to the other competing applications. Nothing in the Court's judgment gave the respondent a greater right.

III

THE COURT BELOW, EVEN IF IT WERE AUTHORIZED TO CONTROL THE PROCEDURE OF THE COMMISSION, WAS NOT AUTHORIZED TO ISSUE THE WRIT OF MANDAMUS

We have shown a basic lack of authority in the court below to control the proceedings by which the Commission exercises the administrative duty of granting applications for construction permits or licenses. In this connection we shall point out the rather less fundamental considerations which show the court below had, in any event, neither power nor occasion to issue a writ of mandamus.

A. The Court Below Has No Jurisdiction To Issue Mandamus to the Commission

It must, at the outset, be pointed out that the court below is without jurisdiction to issue a writ of mandamus to the Commission.

The District Court for the District of Columbia, prior to the effective date of Rule 81 (b) of the Federal Rules of Civil Procedure, had power to issue writs of mandamus because it was the highest court of original jurisdiction in the District of Columbia, and on February 27, 1801, the Maryland courts of that nature had such a power. *Kendall* v. *United States,* 12 Pet. 524, 618–626. But, apart from statutory provision, no other court in the District has power to issue the writ, because not until after February 27, 1801, did other courts of Maryland have such a power. *Kendall* v. *United States, supra,* 621. Specifically, the Court of Appeals, which has no general "original common law jurisdiction" (*Sullivan* v. *District of Columbia,* 19 App. D. C. 210, 214; *Universal Motor Truck Co.* v. *Universal Motor Co.,* 41 App. D. C. 261, 262), cannot issue the prerogative writ without statutory authorization.

The only statutory provision which can be argued to authorize issuance of a writ of mandamus to the Commission is Section 33, of Title 18 of the District of Columbia Code, giving the court below "power to issue all necessary and proper writs in aid of its appellate jurisdiction." But, as we have shown (*supra,* pp. 41–42), the jurisdiction over the Commission given the court below by Section 402 of the Communications Act is original, not appellate. Section 33, therefore, does

not afford a basis for issuance of the writ. And, since the original jurisdiction is statutory and limited, rather than common law and general, it is insufficient to permit invocation of the common-law powers of mandamus which attached to the District Court.[14]

B. The Petition for a Writ of Mandamus Was Premature and Administrative Remedies Had Not Been Exhausted

Even if the court below had jurisdiction to issue a writ of mandamus to the Commission, exercise of that jurisdiction is forbidden by almost equally basic limitations: the necessity that the injury be matured and the necessity that administrative remedies be exhausted before relief is sought from the courts. These restrictions against hasty recourse to the courts may some times express different principles, *Pacific Tel. & Tel. Co.* v. *Seattle*, 291 U. S. 300, 304, but here they coalesce and are simply alternative phrasings of the prohibition against issuance of the writ of mandamus by the court below before respondent can know that it will be aggrieved by the administrative process.

The injury of which respondent complains at this stage is merely that its application was set for joint hearing on a comparative basis. None can say whether the Commission will grant the application of respondent or of another. Certainly until there has been a refusal by the Commission, respondent cannot com-

[14] The jurisdiction given the court below by Section 402 (b) might be said to be original under Article III, yet appellate under Title 18, section 33 of the District Code. This seems, however, to be an unduly artful reading of well-understood terms.

plain that its application will not be granted. It has, however, obtained the extraordinary relief of a prerogative writ simply (1) because it fears its application may be denied, or (2) because it does not wish the inconvenience of another hearing. It is perfectly clear that neither complaint is sufficient to invoke judicial relief of any nature.

Litigants on numerous occasions have attempted to attack the administration of licensing statutes before they make sure that the administrative action will be adverse. It is settled that no one who "has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration." *Smith* v. *Cahoon,* 283 U. S. 553, 562. See, also, *Gundling* v. *Chicago,* 177 U. S. 183, 186; *Lehon* v. *City of Atlanta,* 242 U. S. 53, 55–56; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 553–554; *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, 616–617. Respondent falls well within this rule. It has, true, made an application. But it sought and obtained a writ of mandamus to control the procedure by which the administrative process was to be completed. Until the Commission has finally acted, there can be no certainty that respondent will have an injury of which it can complain. Such was the ruling in *McChord* v. *Louisville & Nashville R. Co.,* 183 U. S. 483, 502, and *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 228, where the administrative process of rate regulation had been commenced but not completed.

It is, of course, certain that respondent will have its application considered on a comparative basis with the

other two applications, rather than on its original record alone. But the inconvenience, distaste, or expense of participation in an administrative hearing offers no ground for seeking escape by recourse to the courts. This rule applies to actions at law, *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 343; *First National Bank* v. *Board of County Commissioners,* 264 U. S. 450, 455; as well as in equity, *Pacific Tel. & Tel. Co.* v. *Seattle,* 291 U. S. 300, 304; *Peterson Baking Co.* v. *Bryan,* 290 U. S. 570, 575; *White* v. *Johnson,* 282 U. S. 367, 374; *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, 385; *Petroleum Exploration, Inc.* v. *Public Service Commission,* 304 U. S. 209, 220, 221; cf. *California* v. *Latimer,* 305 U. S. 255, 260.

The relief sought by respondent, and granted by the court below, seems therefore clearly to be "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 50–51. The many cases there collected are weighty evidence of the uniformity with which this Court has recognized that it "is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way." (*United States* v. *Sing Tuck,* 194 U. S. 161, 168.) The court below granted a writ of mandamus at the instance of one who does not know whether the Commission action will injure him in any way and who simply prefers to have his application given a favored status and heard on its original record.

We think it plain that this relief has not contributed to the orderly disposition of the three conflicting applications for broadcast stations in Pottsville.

C. The Commission Was Not Under a Ministerial Duty and Respondent Had No Clear Right

We have shown that the Act commits to the Commission alone the control of its procedure and the duty of granting or refusing applications for construction permits and station licenses (*supra,* pp. 28–32). We have shown that the Act requires the Commission to grant, among the three conflicting applications for a Pottsville broadcast station, that which will best serve the public interest, convenience, or necessity (*supra,* p. 14). We have shown that a sensible way to consider the three applications is in a single hearing on a comparative basis (*supra,* pp. 15–16). Respondent will doubtless oppose these conclusions, which to us seem almost self-evident. But it seems wholly impossible that this Court could conclude that the Commission was so plainly in error that it could be said to be under a "ministerial duty" to consider respondent's application on its original record and without regard to the conflicting applications then pending, or that respondent could be said to have a "clear right" to compel the procedure which the court below has decreed for the Commission.

Yet there will be no dispute but that where "the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving

the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States ex rel. Kadrie,* 281 U. S. 206, 219. See, also, *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 543; *United States ex rel.* v. *Interstate Commerce Commission,* 294 U. S. 50, 61; *United States* v. *Wilbur,* 283 U. S. 414, 420; *Work* v. *Rives,* 267 U. S. 175, 183–184; *Interstate Commerce Commission* v. *Waste Merchants Assn.,* 260 U. S. 32, 35; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Redfield* v. *Windom,* 137 U. S. 636, 644. It seems necessarily to follow that the court below, in issuing its writ of mandamus, seriously breached this time-honored restriction upon the use of that extraordinary prerogative writ.

D. Equitable Principles Forbid Issuance of the Writ of Mandamus in This Case

A writ of mandamus is an extraordinary legal remedy. But its issuance is controlled by equitable principles. *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 312; *Arant* v. *Lane,* 249 U. S. 367, 371; *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 96; *United States* v. *Dern,* 289 U. S. 352, 359; *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 543–544. Any one of three recognized limitations upon the grant of equitable relief precludes issuance of the writ of mandamus in this case.

1. *There is no Irreparable Injury.*—We have already shown (*supra,* pp. 51–52) that respondent can point to *no* injury which is certain to result from the Commission's order setting the three applications for oral

argument. Much less can it point to any irreparable injury. The petition for a writ of mandamus should therefore have been denied.

2. *There is an Adequate Remedy by Appeal.*—Section 402 (b) (1) of the Act gives the respondent the plain and perfectly adequate remedy of appeal to the court below from a denial by the Commission of its application for a construction permit. Yet the court below issued the writ notwithstanding the settled rule that mandamus will not lie where another adequate remedy is available. *United States ex rel. Crawford* v. *Addison,* 22 How. 174; *In re Morrison,* 147 U. S. 14, 26; *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 544; *Sykes* v. *Jenny Wren Co.,* 78 F. (2d) 729 (App. D. C.)

3. *The Equity of the Statute.*—Since issuance of a writ of mandamus is controlled by equitable principles, the court below should not have granted that extraordinary relief except it would have satisfied the conscience of the chancellor as well as the demands of the respondent. But "it is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." *United States* v. *Morgan,* 307 U. S. 183, 194. When the case involves an administrative agency created to enforce an Act of Congress, the statute is a definitive standard of the public interest which must shape the judicial as well as the administrative action. *United States* v. *Morgan, supra,* 191.

Here there seems plainly to be a conflict between the relief granted by the court below and the requirement of Section 319 (a) that the Commission grant the application only if it would serve the public convenience, interest, or necessity. We have shown (*supra*, pp. 12–20) that the ultimate effect of the decision below will not be to deprive Schuylkill or Pottsville Radio and News of a permit and license if the Commission should find one of them to be qualified and to offer better radio service. But, under the writ of mandamus, respondent's application would have to be granted, if it is otherwise qualified, without regard to the subsequent refusal to grant a station license to respondent which would be necessary if one of the others were found to be a preferable applicant. This flies in the teeth of Section 319 (a), the command of which is not to be ignored because any harm may later be undone, and is in sharp contradiction to any sensible pattern of procedure. If ever there be an occasion for a court guided by equitable principles to intermeddle with the administrative process, it should be to enforce and not to contradict the policy of the statute. Since the relief granted by the court below cannot be squared with either the terms or the policy of the statute, its action was in striking disregard of the equitable standards which should control issuance of a writ of mandamus.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision and judgment of the court below

should be reversed with instructions to dismiss respondent's petition for a writ of mandamus.

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DECEMBER 1939.

APPENDIX

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended May 20, 1937 (47 U. S. C. Supp. IV, Secs. 151 *et seq.*):

SEC. 4 * * *

* * * * *

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * *

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of

Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting

licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

* * * * *

SEC. 312. * * *

* * * * *

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given

reasonable opportunity to show cause why such an order of modification should not issue.

* * * * *

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for con-

struction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * *

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio sta-

tion license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall, within thirty days thereafter, file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested per-

sons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the Court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues

involved upon said appeal and the outcome thereof.

SEC. 414. Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

Radio Act of 1927, c. 169, 44 Stat. 1162:

SEC. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the Commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and

character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal.

The last paragraph of Section 16 of the Radio Act of 1927 was amended, c. 788, 46 Stat. 844, to read as follows:

> At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 265.

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,

vs.

THE POTTSVILLE BROADCASTING COMPANY.

OPPOSITION OF THE POTTSVILLE BROADCASTING COMPANY TO PETITION FOR WRIT OF CERTIORARI.

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Cases Cited.

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OPPOSITION OF THE POTTSVILLE BROADCASTING COMPANY TO PETITION FOR WRIT OF CERTIORARI.

A.

THE FACTS AND THE ISSUE.

The real issue, stripped of all verbiage and particularities, is whether the "supremacy of law" shall be recognized in connection with decisions of the Federal Communications Commission—whether there shall be *any* judicial review, coupled with authority to enforce the conclusions resulting therefrom, of decisions of the Federal Communications Commission.[1]

The Pottsville Broadcasting Company on May 19, 1936, filed an application for a permit to construct a new radio broadcasting station in Pottsville, Pennsylvania. The Com-

[1] In his separate opinion in *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 84, Mr. Justice Brandeis said:

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied, and whether the proceeding in which facts were adjudicated was conducted regularly."

mission designated the application for hearing to determine the legal, technical and financial qualifications of the applicant, the need for the station, etc. Six weeks thereafter and, under the Commission's own rules,[2] too late for a hearing at the same time, the Schuylkill Broadcasting Company filed an application for the same facilities and, through the medium of a petition to intervene, took part in the hearing.[3] Such hearing was held before an examiner and was for the sole purpose of determining the propriety of granting respondent's application, which was the *only one heard* at the time. The examiner recommended that it be granted. The Commission found that there was a need for the station and that the applicant was legally and technically qualified, but it reversed the examiner and denied the application for the reason that it considered that the applicant was not financially qualified because of what the court below termed an "incorrect supposition" as to the application of a law of the State of Pennsylvania. It also expressed the opinion, as a secondary reason for its action, that "local" stations should be controlled by persons who are familiar with the needs of the area to be served.

The Court of Appeals for the District of Columbia re-

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[2] Rule 106.4 (Sec. 12.21 of the new rules) provides that "In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, *excepting, however, applications filed after any such application has been designated for hearing.*" (Emphasis supplied.)

[3] The fact that a party has been allowed to intervene and participate in a hearing has never been regarded by the Commission as any indication that the intervener has any right to a comparative or prior consideration of such application as it may have pending. This policy of the Commission has found expression in the new rules, Sec. 1.102 of which provides, in part: "The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same."

versed the Commission on the ground that, as a matter of law, it erred in holding that The Pottsville Broadcasting Company was not financially qualified. This error the Commission in effect conceded (R. 3). However, in remanding the case the court left open for further consideration by the Commission the sole question of whether the latter had adopted, or intended forthwith to adopt as a definite policy the disqualification of corporate applicants which may be controlled by nonresidents of the area to be served.

The Commission, without asking leave of the Court of Appeals to enlarge the record, and without any indication of an intention to announce any policy concerning the control of stations by nonresidents, scheduled the application of The Pottsville Broadcasting Company for consideration with two other applications, that of the aforementioned Schuylkill Broadcasting Company and that of the still more dilatory Pottsville News and Radio Corporation, the final decision to be based upon a *comparative* consideration. (R. 7, 8.)

In its decision (R. 24) on the petition filed by The Pottsvill Broadcasting Company for writs of prohibition and mandamus to prevent the comparative consideration proposed by the Commission and to compel consideration on the record as made, the court held (R. 29) that it was the duty of the Commission to comply with the order remanding the case and, "unless for some exceptional reason it obtains leave of this court to reopen the case, to reconsider the matter on the record and in the light of this court's opinion"; also, that The Pottsville Broadcasting Company "ought not to be required any more now than originally to be put in hodgepodge with later applicants whose records were not made at the time of the previous hearing."

The Commission, in its petition for a writ of certiorari

(p. 2), has recognized the question presented to be "whether the court below has power to issue a writ of mandamus to compel the Commission to reconsider petitioner's application on the original record and without regard to the subsequent applications." This statement may appear innocuous enough at first reading but, upon reflection and in the light of all the circumstances, it means nothing more or less than that the Commission proposes to have the "last word" *in any event*, and to nullify, even though it may not openly disregard, any order of the court which may be contrary to what the Commission thinks proper.

Fortunately, the Congress has specifically provided for a review of the Commission's decisions and has stated just what effect the judgment of the court shall have. Section 402 (e) of the Communications Act, which Section is set forth in full in the appendix to the Commission's Petition, provides that when the Court of Appeals enters an order reversing a decision of ths Commission "it shall remand the case to the Commission to carry out the judgment of the court", and that the court's judgment "shall be final", subject to review by the Supreme Court on writ of certiorari.

These specific provisions of the statute clearly show that the Commission not only has the duty of complying with the court's order but also that it has no other or additional right of action. The very basis for such further action as it may be free to take is the *record which was before the court*. Indeed, the statute (Sec. 402 (e)) requires the court to "hear and determine the appeal *upon the record before it*." Otherwise, the Commission would be enabled, in almost every conceivable case, to defeat the court's order by the simple expedient of considering the case on new issues, new parties, or both, and then deciding the case on grounds which were neither before the Com-

mission nor before the court in the first instance. It is just such a prospect which is effectively controlled and orderly procedure and the interests of litigants safeguarded by the rule enunciated by this Court, and followed by the Court of Appeals herein (R. 27), that when a case has been decided on appeal and remanded to the trial court, the latter has no authority, without leave of the appellate tribunal, "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer". *Re Potts*, 166 U. S. 263, 267.

Because of the far-reaching demoralizing effect which the successful assertion of the Commission's contentions would have, not alone upon applicants for facilities under the Communications Act, but also upon parties who may be subjected to the whims of any administrative agency, a somewhat comprehensive argument is submitted.

B.

ARGUMENT.

Point 1. The Original Decision of the Court Below on the Fundamental Questions of Law Stands Unchallenged.

The petition raises no question concerning the original decision of the Court of Appeals (98 F. (2d) 288) reversing the Federal Communications Commission for errors of law. (R. 1-5.) That decision, dealing with the substantive and fundamental questions involved, has never been the subject of a petition for rehearing or of any other process of review; nor has the Commission ever suggested that it was in any way erroneous. It was made on a complete record which the Commission has never asked leave to supplement or alter. The decision, therefore, stands unchallenged. Yet this is the decision with which the Commission refused to comply, which refusal necessitated a second appeal to the court below, resulting in an order for the issuance of a writ of mandamus to compel obedience.[4] (R. 24, 37.)

The unanimous decision of the court below (April 3, 1939, R. 24), indicating its purpose to issue the writ of mandamus unless the Commission voluntarily complied with the court's first decision (May 9, 1938, R. 1) contained an elaborate and able discussion of the points raised in the oppositions presented both by the Commission and by the Schuylkill Broadcasting Company to the petition for the writs of prohibition and mandamus. (R. 24-29.) Thereafter the Commission filed a petition for rehearing again presenting substantially the same arguments which

[4] Not only is no question raised as to the correctness of the first decision of the court below, or as to any fact stated in that decision, but, significantly enough, the transcript of record submitted to this Court does not include the opinion of the Commission, evidencing the fact that nothing is to be found therein to sustain the validity of the Commission's order of denial despite the statutory requirement that the Commission shall make "a full statement in writing of the facts and grounds for its decision" (R. 29).

are now made to this Court in the petition for a writ of certiorari. After carefully examining the authorities cited and the arguments based thereon the court below in a *per curiam* opinion denied rehearing (R. 33).

Point 2. The Commission Seeks to Nullify the Court's Decision by Indirection.

Instead of reconsidering the one point on which the cause was remanded (as to whether the public interest required it to change to a policy in line with what it did in the instant case, or to adhere to and announce as a general policy for uniform application the practice which it has followed in all other cases both prior and subsequent to its decision herein), the Commission undertook to reopen the case for unrestricted reconsideration, not alone on the record as submitted to the court, but with the addition of another record, not submitted to the court, involving other issues and other parties.

This is the "further action" which the Commission proposed to take and as to which counsel say:

> ". . . We are at a loss to see why the mere prospect of 'further action', sanctioned by this Court, should be thought such a departure from the first judgment of the court below as to warrant mandamus; certainly there is no charge that the Commission will disregard the rulings of the Court of Appeals on the issues which were before that court on the appeal from the Commission's denial of the respondent's application." (Petition, 13.)

It is inconceivable that such "further action" can be regarded as responsive to the court's mandate, or, to use the language quoted by counsel from this Court's opinion in *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, that it evidenced a purpose on the part of the Commission

"to respect and follow the Court's determination of the questions of law." (Petition, 12-13.)

There was no need or warrant for the further action proposed by the Commission, and unless stopped by the court's order it could lead only to further delay and expense incidental to such proposed hearing before the Commission, the time required for handing down the Commission's decision, and for another appeal to the court. This Court has frequently held that another appeal at the end of long proceedings which must go for naught is not an adequate remedy.[5]

So far from being correct in saying that this Court has sanctioned further action such as that proposed by the Commission in this case, the fact is that this Court has emphatically and uniformly condemned it, as shown by the cases cited in the opinion of the court below. (R. 27.)

If any reasonable ground existed in the public interest for a modification of the judgment below or for reopening the case for the hearing of new parties or newly discovered evidence, such ground must have been known to the Commission long ago, and it was its duty to apply seasonably to the court for such purpose. The failure of the Commission to submit such an application for a hearing *de novo* is to be taken as conclusive evidence that no new matter of a material sort exists. As stated by this Court in *National Brake & Electric Company v. Christensen*, 254 U. S. 430, "such applications are addressed to the sound discretion of the appellate tribunal, and should be decided upon considerations addressed to the materiality of the new matter and diligence in its presentation."

No such application has ever been filed because no "new

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[5] "Where irreparable injury is threatened, or the damage be of such a nature that it cannot be adequately compensated by an action at law, *or is such as, from its continuance, to occasion a constantly recurring grievance*, the party is not ousted of his remedy by injunction." *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 12. (Emphasis supplied.)

matter" could be alleged to exist as affecting the one question sent back for reconsideration. There is no need to suggest that the time has long since passed for any claim of "diligence in its presentation," for the Commission now assumes the arrogant position that it never owed any duty to the court to file such an application under any circumstances.

Thus, the larger question of the substantive right involved in the case cannot and is not sought to be reopened at this stage. The sole question remaining, according to the Commission's contention, is one of procedure. *But if the procedure sought to be followed by the Commission should be sanctioned it would vitiate and render futile the original judgment of the court below which restricted reconsideration to one point.*

It would be a curious result if the Commission should be allowed to ignore the judgment by adopting arbitrary procedure not intended or calculated to carry it out and then to plead by way of estoppel against further judicial control that it possesses "administrative discretion" which lifts it beyond the reach of any process necessary to protect the court's jurisdiction! A complete answer is to be found in the decision of this Court in the *Nelson Bros.* case, *supra*, as follows:

> ". . . The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standard validly set up, whether it acts within the authority conferred or goes beyond it, *whether its proceedings satisfy the pertinent demands of due process*, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, *are appropriate questions for judicial decision.* These are questions of law upon which the court is to pass. . . .
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". . . In this aspect, the questions are . . . (3) whether, *in its procedure*, the Commission denied to the respondents any substantial right." (Emphasis supplied.)

Point 3. What the Court of Appeals Decided.

In its first decision (May 9, 1938) the court below swept aside the primary ground assigned by the Commission as the basis for its refusal to grant the license, as being wholly invalid, stating in this connection, "it is undoubtedly true, as the Commission in effect now concedes, that the validity of the stock subscriptions was in no respect dependent upon any action by the Pennsylvania Commission." (R. 3.) The "incorrect supposition" concerning this was the sole ground assigned by the Commission for its refusal to make the grant on the basis of "financial inability." (R. 3.)

As a sort of "supplemental justification of the rejection" the Commission stated that the president of the applicant corporation had never resided in Pottsville and had no present purpose of residing there, "but failed to find that fact an adequate ground for rejection." (R. 27.) As to this the court observed in its first opinion that the president and principal stockholder—

". . . associated with him and brought into the new corporation a number of the leading citizens of that town in order to effectuate his purpose. . . . All are men of prominence, standing, and character in the community. It is quite true that their interests for the time being are more or less nominal, but Drayton testified that in associating them with himself in the new enterprise he anticipated and hoped that their financial interest would increase with the station's growth and expansion. There is nothing in the record to suggest that they are mere dummy directors. Their own evidence indicates the contrary and at least for

the period of their services as directors they would have the same individual responsibility as Drayton in the conduct of the corporation's business. They at least, if anybody, know the local requirements." (R. 3-4.)

The Court stated that "As applied here, this ground of refusal was obviously secondary rather than primary. It perhaps would not have influenced the Commission to the point of denying the license, except for what the Commission viewed as the lack of financial ability on the part of the applicant." Nevertheless, in deference to the view that this secondary ground involved a question of policy which the statute intended to leave in the hands of the Commission, the case was remanded for reconsideration on that point. (R. 4.)

In its second opinion (April 3, 1939) the court said: "The case, with that question alone open, was remanded to the Commission for reconsideration." (R. 28.)

Point 4. The Commission Refuses to Announce a Rule or Policy Which Will Avoid Discrimination and Favoritism.

Obviously such "reconsideration" was intended to be confined to the one question of policy and was not to be used as a vehicle for bringing in a new case, involving new issues and new parties. But the Commission refused and still refuses to announce a rule or policy for uniform application, such as might be permitted by the decision of the court. In fact, it is apparent that *the Commission is unwilling to bind itself to do in all cases without discrimination what it arbitrarily and capriciously did in this one case to defeat this particular applicant for reasons best known to itself and which it has shown no disposition to disclose.* It is demonstrable—indeed, the fact as alleged

in the petition for writs of prohibition and mandamus is not disputed on this record, that "the Commission has shown that it intends to continue its contrary policy, heretofore announced in numerous decisions, of sanctioning the control of applicant corporations by nonresidents who are not personally familiar with the needs of the area to be served." Decisions are there cited to show that the Commission has continued such contrary policy since its decision herein and even since the decision of the court below (R. 7, 9).

The court, therefore, was justified in saying (R. 29), in its later opinion granting mandamus:

> ". . . But we think it is obvious that the particular objections of the Commission to a reconsideration on the record—to which we have referred—are mere makeweights, and that the real bone of contention is the insistence by the Commission upon absolute authority to decide the rights of applicants for permits without regard to previous findings or decisions made by it or by this court."

The Commission claims that upon the issuance of the court's mandate it set in motion the machinery or procedure to comply therewith but was stopped by the writ of mandamus issued pursuant to the court's second decision, which is the sole occasion for the petition herein.[6] The question is: Did the Commission comply with the court's mandate or judgment, and was it required so to do?

Its petition for certiorari sufficiently evidences the fact

[6] The order, entered May 15, 1939, commanded the Commission "to carry out the judgment of this court, namely, (a) to set aside the order of the Federal Communications Commission dated June 9, 1938, which denied the application of petitioner, Pottsville Broadcasting Company, and designated said application for hearing on a comparative basis with the applications of the Pottsville News and Radio Corporation and of the Schuylkill Broadcasting Company, and (b) to hear and reconsider the application of petitioner, Pottsville Broadcasting Company, on the basis of the record as originally made and in accordance with the opinions of this court in this cause filed on May 9, 1938, and on April 3, 1939" (R. 37).

that the Commission has not complied and does not intend to comply unless this Court upholds the decision of the court below. It cannot be thought that when the court required the Commission to reconsider the one question left open (R. 4) it intended to open wide the door for two other applications, involving another record, other issues and other parties not before the court and who were never eligible to become parties under the Commission's rule,[7] and to permit the Commission in consequence to base its new decision upon facts not properly before it.

If the Commission, in the face of the court's decision, may assign the case for reargument along with two other applications on another record made by other parties, *it would seem to follow logically that the Commission has power then to decide the case without regard to the restrictions imposed by the court's decision;* otherwise such reargument would be a futility—a waste of both time and money. It would simplify matters to bury the Communications Act and appoint a dictator to say who shall and who shall not operate radio stations and how they shall be operated.

Point 5. The Record Is Binding Upon Court and Commission Alike.

The pertinent provision of the statute is quoted in the opinion of the court below. (R. 26.) Since the court having statutory power of review is required to "hear and determine the appeal upon the record before it," how can it be said that the subordinate tribunal, whose decision is being reviewed, is unrestricted, and, after the court has remanded the case on one point for reconsideration, may disregard the mandate and take such procedural steps as it may choose in order to build up a new record, with new

[7] Rule 106.4.—See Note 2, *supra*, p. 2.

parties who are to be allowed "full latitude" (R. 8) to argue anything they please? Does the statute mean one record for the court and then, subsequently, another record or any number of records for the Commission, unrestricted as to time, issues, and parties, and regardless of the fact that "the record" has already been made and considered by the court and the Commission as the basis for their respective decisions?

If the Commission is to be allowed such latitude, what estimate can be made as to when the litigation may terminate, and the public interest begin to be served? In such case will not the litigation last as long as the Commission chooses to disagree with the court? Is this the result intended by the statute in providing that "At the earliest convenient time the court shall hear and determine," and that the court's judgment "shall be final"? Obviously, there can be no finality to the judgment of the court "upon the record before it" if that record can be changed at any time and in any way the Commission chooses without prior leave asked of or granted by the court. Since the statute provides that the court "shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission," and to "remand the case to the Commission to carry out the judgment of the court," is the court powerless, in aid of its jurisdiction, by mandamus or otherwise, to restrain the Commission from taking procedural steps not essential to a reconsideration of the one question left open by the court's mandate but intended to reopen the case for consideration *de novo* and to include other records and other parties?

Point 6. The Appellate Court Has Power and Is in Duty Bound to Protect Its Jurisdiction and Enforce Its Mandate.

The rule repeatedly announced by this Court is that when a case has been decided on appeal and remanded to the trial court, the latter has no authority, without leave of the appellate court, "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer". *Re Potts*, 166 U. S. 263, restating the rule announced in *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, and as subsequently affirmed in *D. L. & W. R. Co. v. Rellstab*, 276 U. S. 1. In the case last cited this Court said:

> "Like other appellate courts, the Circuit Court of Appeals has power to require its judgment to be enforced as against any obstruction that the lower court, exceeding its jurisdiction, may interpose. *McClellan v. Carland*, 217 U. S. 268. The issue of a mandamus is closely enough connected with the appellate power."

See, also, *Baltimore & O. R. Co. v. U. S.*, 279 U. S. 781, and *Illinois ex rel. Hunt v. Illinois C. R. Co.*, 184 U. S. 77.

It is asserted that "even if an equity court under comparable circumstances would be powerless to hear new issues, the administrative tribunal is subject to no such limitation." (Petition, 14.)

This claimed exemption of administrative tribunals has never been recognized by this Court in any case and the court below could not do otherwise than reject it. Indeed, there is even greater need for applying the limitations called for by the rule where an administrative agency is concerned for, as this Court observed in *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 52:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands.

> Some may be expert and impartial, others subservient."

The argument now advanced for a different rule as applied to an administrative tribunal contains nothing that was not presented to the court below. (Petition, 13-14.) It is as vague as it is dogmatic. The one case (*Ford Motor Co. v. Labor Board*, 305 U. S. 364) cited as authority for the contention does not lend it the slightest support, as was found by the court below after careful examination. (R. 33.) The extracts from the *Ford* decision quoted in the petition (p. 14) were torn from the context in two separate paragraphs in order to fit them to the exigencies of this case and rob them of their real meaning.

We deem it unnecessary to attempt any elaborate discussion of the *Ford Motor Company* case to show that it does not sustain the Commission's contentions in any respect, but we do ask the indulgence of the Court in adverting to it for the purpose of illustrating the complete harmony between that decision and our own contentions.

Counsel concede that "The provisions governing review are substantially similar in the Communications and the National Labor Relations Acts." (Petition, 13.)

As shown by the decision in the *Ford* case, after the decision of this Court in *Morgan v. U. S.*, 304 U. S. 1, the Labor Relations Board, because of faulty procedure, filed a motion for leave to withdraw its petition for enforcement of its order. This motion was granted. Subsequently the court granted another motion of the Board—

> ". . . to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case."

No similar motion has ever been filed in this proceeding

by the Communications Commission for leave to reform or modify its decision and order "upon a reconsideration of the entire case." Naturally, upon such a broad remand in the *Ford* case, "if further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken." There was no such remand in the instant case *but one restricting reconsideration to a single point.* And the statement of this Court in the *Ford* case, that the authority conferred upon the Board to modify or set aside its findings and order "ended with the filing in court of the transcript of record" applies equally to limit the authority of the Communications Commission in the instant case. This is in line with the decisions, beginning with *Sanford Fork & Tool Co., supra,* holding that a subordinate tribunal, without leave of the appellate court, has no authority "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer," but is bound by the decree as the law of the case and "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded . . ."

In the *Ford* case this Court said:

> ". . . In the circumstances of the present case we think it is clear that the court was possessed of exclusive jurisdiction of the administrative proceeding 'and of the question determined therein,' and thus of the power of 'enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.'"

The Court also observed that—". . . the Board, in the presence of the court's continued and exclusive jurisdic-

tion, remained without authority to deal with its order . . . ".

The decision of this Court in the *Ford* case completely disposes of the contention that an administrative tribunal stands on a different footing from a lower equity court in responding to the remand of a cause; and also of the contention that the remand in the instant case, restricting reconsideration by the Commission to one point, is an encroachment upon administrative functions. For convenient reference we quote in the margin two paragraphs from that opinion which include the fragments appearing at page 14 of the petition for writ of certiorari.[8]

These expressions, read in conjunction with the entire

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8 "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied [cases]. Such a remand *may be* made to permit further evidence to be taken or additional findings to be made upon essential points [cases]. So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70½), it is our practice to set aside the decree and remand the cause for further proceedings [cases]. The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and, while the court must act within the bounds of the statute and without intruding upon the administrative province, *it may adjust its relief to the exigencies of the case* in accordance with the equitable principles governing judicial action. The purpose of the judicial review *is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements.* The statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter it is well established that the court may remand the cause to the Commission *for further proceedings to the end that valid and essential findings may be made* [cases]. Similar action has been taken under the National Labor Relations Act in Agwilines v. National Labor Relations Bd. (C. C. A. 5th), 87 F. (2nd) 146, 155. See also National Labor Relations Bd. v. Bell Oil & Gas Co. (C. C. A. 5th), 91 F. (2d) 509, 515. *The 'remand' does not encroach upon administrative functions.* It means simply that the case is returned to the administrative body in order that it may take further action *in accordance with the applicable law.* See Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 278.

"Such a remand does not dismiss or terminate the administrative proceeding. *If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard* [cases]. If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken [cases]. Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements." *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373-374. (Emphasis supplied.)

opinion in the *Ford* case, are in harmony with and serve to illustrate the long-established rule announced in *Re Potts* and other cases already cited to the effect that an appellate court has complete jurisdiction to restrict or broaden its remand to an administrative tribunal, as to an inferior court, in any way necessary to meet the exigencies of a particular case, and that such a tribunal has no authority to go one step beyond what is permitted by the remand either procedurally or otherwise.

If any doubt could be entertained as to what this Court meant in the *Ford* case it would be instantly dispelled by the expression in *Morgan v. U. S., supra:*

> "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

In the *Morgan* case on a former appeal (298 U. S. 468) this Court said that the duty of the Secretary of Agriculture to "determine and prescribe" what shall be the just and reasonable rate "is a duty which carries with it fundamental procedural requirements . . . Facts and circumstances must not be considered which should not legally influence the conclusion . . ." Citations to the same effect could be multiplied indefinitely but we ask leave to conclude the discussion under this head with the following:

> ". . . In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to

its action." *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 59.

Point 7. The Court Below Has Not Attempted to Set Itself Up as a "Revising Agency" on Any Question Committed to the Commission's Discretion.

It is asserted that the court below has attempted to set itself up as "a superior and 'revising agency' in the administrative field." (Petition, 11-12.)

The fact is that at no stage of the proceeding has the court undertaken to revise the Commission's decision. What it did in its first decision, which, as already shown, the Commission has never claimed to be erroneous, was to reverse the Commission on the primary ground constituting the real basis for its decision. This was the "incorrect supposition" that the consent of the Pennsylvania Securities Commission was essential to the validity of the proposed stock issue by a Maryland corporation organized to engage in interstate commerce. This was the sole basis for the Commission's refusal to make the grant "on the basis of financial inability." And as the court stated in its opinion, "the Commission in effect now concedes that the validity of the stock subscriptions was in no respect dependent upon any action by the Pennsylvania Commission." (R. 3.)

As to the other ground of refusal, which the court said "was obviously secondary rather than primary," and which "perhaps would not have influenced the Commission to the point of denying the license, except for what the Commission viewed as the lack of financial ability on the part of the applicant," the court showed extraordinary caution and, if anything, leaned backward in refusing to set itself up as a "revising agency" in the administrative field. It said (R. 4):

"'. . . we think the interests of justice require

that the case be sent back to the Commission solely that it may reconsider it."

And to make its position perfectly clear the court added:

> "If the Commission should be of opinion, upon reconsideration, that the application ought not to be granted because a stranger to Pottsville has the controlling financial interest in the applicant corporation, and should announce a policy with relation to the grant of local station licenses, confining them to local people, we should not suggest the substitution of another view. But in saying this we are not unmindful of the obvious fact that such a rule might seriously hamper the development of backward and outlying areas." (R. 4.)

Even subsequent to its first decision, when the Commission had plainly indicated a continuing attitude of obdurate contumacy and so made it necessary for respondent to file a petition for writs of prohibition and mandamus, the court did not undertake to determine *how* the question of policy should be determined, *but only that the Commission should decide it one way or the other.* No court could or should have exhibited more patience and self-restraint.

The Commission had construed and acted on its own rule (Rule 106.4, now Sec. 12.21 of the Commission's Rules of Practice and Procedure) as constituting a bar to contemporaneous hearing of applications filed after the first application had been designated for hearing. The new or changed policy which the Commission was given leave to announce was intended to apply only to "local" stations and therefore could not in any event affect this application, which was for a "regional" station as defined by the Commission's rules. The unwisdom of such a policy, even as applied to local stations, was emphasized by the court and tacitly recognized by the Commission in consistently following a contrary practice in all other cases

and in refusing to prescribe such a policy for uniform application when this case was remanded. In view of these facts we respectfully submit that, instead of merely requiring the Commission by mandamus "to hear and reconsider the application of petitioner, The Pottsville Broadcasting Company, on the basis of the record as originally made and in accordance with the opinions of this Court in this cause filed on May 9, 1938, and on April 3, 1939" (R. 33), *the court below had power and properly should have required the Commission to grant the application, the need for the station and the legal and technical qualifications of the petitioner having been recognized and found by the Commission, and the court having held that the Commission committed an error of law in finding that petitioner was not financially qualified.*

Without such relief respondent has suffered and will continue to suffer irreparable injury by reason of protracted and expensive litigation, and the public in the Pottsville area, already denied radio facilities during the more than three years that this application has been pending, will be subjected to further incalculable delay should the Commission be permitted to reopen the case for another hearing on a different record.

Under the procedure contemplated by the Commission, this respondent may be required to appeal again and again to the court until the Commission has exhausted reasons which it might give for denying an application, or until it has heard an endless chain of other applications, subsequently filed, in its pretended search for the "Best". Certainly any "final relief" under such a procedure may be so far beyond the reach of the average applicant as to be no relief at all.

This Court has stated that the mere fact that there is a remedy at law is not enough; that remedy "must be as practical and efficient to the ends of Justice and its prompt

administration as the remedy in equity." *Boyce's Executors v. Grundy*, 5 Pet. 210, 215. And again:

> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances." *Kilbourn v. Sunderland*, 130 U. S. 505, 514, affirmed in *City of Walla Walla v. Walla Walla Water Co.*, *supra*.

Point 8. There Are No "Conflicting Applications" Now Entitled to Consideration.

The petition refers to "the choice between conflicting applications" which counsel assert is committed to the decision of the Commission by the statute and the decisions of this Court. (Petition, p. 12.)

The Commission did not deny this application because it had before it conflicting applications, one of which it considered "best" in the public interest to grant. The two applications now alleged to be conflicting were not filed in time to be heard contemporaneously and on a "comparative basis" under the Commission's Rule No. 106.4, *supra*, which provides, in general, for the consideration of conflicting applications at the same time "so far as practicable," but specifically excepts applications filed after the first application has been "designated for hearing." (R. 20-21; Note 2, supra, p. 2.)

The rule, with the exception as an integral part thereof, was duly promulgated pursuant to the Communications Act and so had the force and effect of law. *Maryland Casualty Company v. U. S.*, 251 U. S. 342, 349. The Commission apparently recognized the exception to the rule as binding when it disregarded the request of the Schuylkill Broadcasting Company to hear its application with that of The Pottsville Broadcasting Company. The latter was designated for hearing six weeks before the former was

filed, and it was actually filed more than six weeks before it was designated. It was therefore excepted from the operation of the rule. (R. 21.) It is hardly necessary to argue that such an exception is clearly in the interest of orderly procedure since, without it, the Commission might become involved with an endless procession of applications, each one of which would delay consideration of that which preceded it, thereby interminably delaying service which would be in the public interest.

The court below did not initiate a preference for the earlier applicant in this case; such preference was derived from the Commission's own rule and its construction and application thereof, which, however, it now seeks to repudiate in order to evade the ruling of the Court of Appeals and to suit its own whimsy.

In the light of these considerations the Commission was not impartially and honestly representing "the interest of the public" in reopening the proceedings for further argument on another record and with new parties, and the "desirability" of so doing was not a matter "peculiarly administrative" in its nature. It was capricious and arbitrary, a flagrant abuse of discretion, and, therefore, unlawful.

Under the circumstances it can scarcely be regarded as fair or legitimate argument for counsel to charge the court below with "subordinating the interests of the public in the administration of the Communications Act of 1934 to the private interest of a particular applicant . . ." (See Petition, p. 8.)

Point 9. The Commission Has Not Been Constituted the Sole Guardian of the Public Interest.

It is claimed that it is "the Commission's statutory duty to represent the interest of the public" (Petition, 13): and that "The choice between conflicting applications, the

preference that as a general rule should be given the earlier applicant, and the desirability of reopening proceedings for further evidence, are matters peculiarly administrative in their nature." It is, therefore, asserted that "The statute and the decisions of this Court commit their decision to the Commission, not to the court below." (Petition, 12.)

We think this argument has already been sufficiently answered. It may not be amiss, however, to call attention to the fact that the court below is also charged with a statutory duty, as well as an inherent judicial duty to concern itself with the interest of the public, and that the extent to which it "may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." *United States v. Morgan*, 307 U. S. 183.

Presumably the public interest is best served by consistent, nondiscriminatory and impartial administration of an Act of Congress. Certainly that is to be understood as the intent of Congress. This is not the first commission or board which has been irked by judicial restraint, or the first that has contended that it was so wise in the sphere of its own activities, so sanctified in its devotion to the public interest, its functions so overwhelmingly important and complex, and so necessary to be exercised in a peculiar way, that the public interest could not be properly served if there were the slightest interference by the courts with its administrative discretion. These pretensions have never been sanctioned by this Court; and yet in this case they have been put forward with unbounded truculence, as witness the following statement made in the petition for rehearing submitted by the Communications Commission to the court below:

> "It can no more be the function of this Court, acting as a judicial tribunal, to control the procedure of the

> Federal Communications Commission, an administrative body, than it can be the function of the Communications Commission to control the procedure of this Court."

A multitude of citations could be given in answer; one will suffice:

> "In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power . . ." *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Company*, 289 U. S. 266.

Under our constitutional system of government no one set of men is clothed with absolute power to determine what is "best" in the public interest. Ambitious men, grasping for power, in all ages have claimed to be actuated by the purest motives. In this case the Communications Commission pretends that the public interest requires it to place one applicant in a special class by denying its application for a reason running counter to the policy or practice followed in all other cases and then claims that such arbitrary and capricious action is not reviewable. "Rights under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise." *Re Hollon Parker*, 131 U. S. 221.

Congress vested the United States Court of Appeals for the District of Columbia with power to review decisions of the Communications Commission in order to insure against just such abuses. As this Court said in *United States v. Morgan, supra:*

> ". . . Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words

should be construed so as to attain that end through co-ordinated action . . . neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."

It makes no difference whether the abuse of power is accomplished by a decision which directly does violence to some right inhering under the law, or is accomplished indirectly through the improper exercise of functions claimed to be "peculiarly administrative," such as the repeated assignment of a case for argument or reargument when there is no need, occasion or warrant for it. Protracting and prolonging litigation unnecessarily has long been recognized as a public evil.

Point 10. The Proposed Action of the Commission Would Not Serve the Best Interest of the Public.

It is contended that "Section 319 (a) requires the Commission not only to determine if a given application is in the public interest, but which of the competing applications will *best* serve the public interest." (Petition, 15.) The language of the statute is: "The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station." But conceding that the Commission must determine which of the "competing applications" will *best* serve the public interest, surely the element of time enters into the equation. Horses do not compete unless they run in the same race on the same day. And one application is not "competing" when it is filed so long after another that the Commission's own rule, as applied by the Commission itself in this case, denies it the right to contemporaneous hearing. The Commission only seeks to repudiate that rule after the court below has recognized its force and effect

by giving it the same construction as did the Commission in refusing the request of the Schuylkill Broadcasting Company (the earliest of the so-called competing applicants) to have its application heard on the same date as that fixed for the Pottsville Broadcasting Company. (R. 14.)

The case, having taken this course under the Commission's rule, was decided by the Commission *on the record so made.* There was no "competing" application then and none when the record was taken up for consideration by the court below. *How can it be said that the reversal by the Court of Appeals because of the Commission's errors of law opened up the case for competing applications theretofore barred by the Commission itself?* The Court of Appeals was right in saying (R. 29):

> ". . . In such a case petitioner ought not now to be put in any worse position than it occupied on the original hearing, and therefore ought not to be required any more now than originally to be put in hodgepodge with later applicants whose records were not made at the time of the previous hearing."

If the Commission, in any case it may choose, is to be permitted to deny a given application on insufficient or false grounds, and, when those grounds are invalidated by the court having statutory power of review, to set up other excuses for such denial, e. g., a vague surmise that another trial or hearing *might* disclose that a subsequently filed application *might* "best" serve the public interest, and if to accomplish its purpose it may waive the time element established by its own rule and applied in the first instance by itself and later given force and effect by the court, then indeed is the standard so indefinite as to confer unlimited power.

The best is seldom attainable. In the long run it is inconceivable that the best interest of the public will be

served by committing that interest to the undisciplined discretion of a tribunal which has so plainly evidenced a disposition to rule by fiat rather than under the law.

CONCLUSION.

This case involves no novel principle of law requiring clarification or further exposition by this Court. The reports are full of such cases where the courts have been compelled to intervene and take action precisely like that taken by the court below.

It may be true, as urged in the petition, that the decision below is one of some gravity "so far as it bears on the administration of the Communications Act," but not because it invades any exclusive province of the Communications Commission. It is important because it seeks to curb the unbridled license of a tribunal which seems to regard the Act of Congress as its personal property, to administer exactly as its fancy prompts, and which resents the effort of the court to require it to stay within the law. It raises no "disturbing possibilities" for administrative agencies not ambitious to indulge their own peculiar theories of personal government.

The Federal Communications Act, according to the language used in Title I thereof, was intended to be administered "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication," etc. 48 Stat. 1064, 47 U. S. C. § 151.

The application of the Pottsville Broadcasting Company was filed with the Communications Commission more than three years ago—May 19, 1936. The Commission has

interposed every possible obstacle to the establishment of radio communication service in the Pottsville area despite the fact that in its decision it said there existed a need for this service and could find no grounds for a denial of this application other than those which the court pronounced arbitrary and capricious.

During this long-drawn-out litigation a World War has supervened. It may be that eventually our country will be involved. In that case who can say that radio communication service in the Pottsville area may not be an important link "for the purpose of national defense"? At least such a contingency seems to have been in contemplation of Congress in enacting this legislation.

If the Commission be allowed such latitude as will result in capricious and arbitrary administration of the Communications Act, ultimately it must lead to complete demoralization so that political considerations more and more will control. And if political considerations control the granting of licenses, they will ultimately control the policies of the broadcasting stations set up under such licenses subject to periodical renewals.

"Freedom of the press" has long been recognized not merely as a cherished tradition of the American people, but as being essential to the preservation of our liberties. No regulation or censorship of the press has ever been attempted, nor would it be tolerated by the people. Freedom of the radio from political interference or domination is equally important; and since this modern method of communication and public discussion is necessarily subject to the regulation of the Federal government, it is vital that such regulation be honest and impartial, free from all political considerations, and, like Caesar's wife, above suspicion. Enslavement of the press would almost certainly follow bureaucratic or political domination of radio broadcasting. Congress was alive to this danger when it

explicitly vested power in the United States Court of Appeals for the District of Columbia to review the Commission's orders.

It having been demonstrated, as we respectfully submit, that the decisions of the court below were right and just, and that that court had jurisdiction under its inherent judicial powers and under explicit authority vested by the Communications Act, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 265.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

THE POTTSVILLE BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

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January, 1940.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia has rendered three opinions in this case. The first opinion (Record, pp. 1-4) was on the merits and is reported in 98 F. (2d) 288; the second opinion (R. 24-29) was on respondent's petition for writs of prohibition and mandamus against the Federal Communications Commission and is reported in 105 F. (2d) 36; and the third opinion (R. 33) was on the petitions filed by the Commission and by the Schuylkill Broadcasting Company, intervener, for rehearing but is not yet reported.

STATEMENT

The statement of facts submitted in the brief filed by the petitioner, hereafter frequently called the Commission, is substantially correct, and no further statement, as such, will be made herein. However, attention is called to respondent's opposition to the petition for writ of certiorari in the event a more concise, yet entirely adequate, statement of the facts is desired.

QUESTION PRESENTED

The question presented is not so simple as the statement of it appearing in petitioner's brief (p. 2). The question is: Inasmuch as the Court of Appeals dealt only with questions of law in its decision (R. 1-4) on the merits, and as the correctness of that decision is not in issue, did the Court possess power to protect its jurisdiction and enforce its judgment upon the refusal of the Commission to give it effect?

Stated differently: Where the Commission, under the guise of a new proceeding and in derogation of its own Rules of Practice, ignores the unchallenged decision of the Court of Appeals on matters of law committed to it for review under the Communications Act, is that Court powerless to enforce its judgment?

SUMMARY OF ARGUMENT.

Point 1. The procedural framework within which applications for construction permits are considered is such that, if a permit should be issued to the respondent, the facilities could not later be taken away by the Commission and given to another applicant without a hearing held for the purpose of determining whether such action would be proper. All the requirements of due process would be imposed and the new applicant would have the burden of proof.

Point 2. The applicant who, under the Commission's rules, becomes entitled to be heard first and who proceeds to meet the statutory requirements is entitled to a grant

without waiting for later applicants to be heard and considered. The Communications Act neither requires nor permits the Commission to delay consideration of an application on the vague supposition that a later application might, for some reason, provide better service. The Act knows only the criterion of public convenience, interest or necessity.

Point 3. The Commission may not oust the jurisdiction of the Court having statutory power of review by setting up, subsequent to the decision of the Court on questions of law, a new procedure involving a new record, other issues and other parties. It is bound by the Court's judgment and may not "intermeddle with it further than to settle so much as has been remanded."

Point 4. The United States Court of Appeals for the District of Columbia and other Federal Courts have power to issue all writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Furthermore, under the District Code the Court of Appeals has "power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction." The Communications Act clearly designates as an appeal any proceeding on review in the Court of Appeals pertaining to the grant or refusal of permits or licenses for radio stations by the Commission.

Point 5. The Court of Appeals, having jurisdiction of questions of law on which the Commission is challenged, has the same power to issue mandamus to protect its jurisdiction in this case as it does in cases on appeal from the District Court. In directing that mandamus issue herein, the Court did not invade the administrative province of the Commission, but merely sought to compel the Commission to carry out the judgment of the Court and to prevent it from straying into another field. Mandamus is merely ancillary to that judgment.

Point 6. The respondent exhausted its administrative remedy before resorting to the Court below, and it has no plain, speedy and adequate remedy at law. When the appeal was filed with the Court below, the administrative remedy had been exhausted, and the Commission cannot alter this fact by attempting to embark on a new proceeding and pretending that thereby it affords an administrative remedy which respondent has not exhausted.

ARGUMENT

In order to avoid repetition, the respondent adopts the argument set forth in its Opposition (pp. 6-29) to the petition for writ of certiorari, and only such argument will be made here as appears to be necessary in order to refute new points raised by petitioner's brief.

Point 1. The Procedural Framework Within Which Applications for Construction Permits Are Considered is Such that, if a Permit Should Be Issued to the Respondent, the Facilities Could Not Later Be Taken Away by the Commission and Given to Another Applicant Without a Hearing Held for the Purpose of Determining Whether Such Action Would Be Proper.

The petitioner (Brief, p. 12) bases its primary argument upon an erroneous hypothesis arising from an apparent misstatement or misunderstanding of the "procedural framework in which applications for construction permits and broadcast licenses are considered." The petitioner states (Brief 16) that it must act upon every application filed and *must* "grant or deny as required by the statutory criteria, *even though a grant may require modification of its action on a previously considered application.*" This statement leads, whether it is intended to or not, to the inevitable conclusion that the Commission not only may, but is required to, take some or all of the facilities from an existing station if a later applicant be found to be *better* qualified but can-

not be issued an instrument of authorization without disturbing the assignment to the existing station. And this would be true regardless of the fact that the existing station was afforded no opportunity to defend itself.

The Commission states (Brief 19) that if it should grant the respondent's application before it considers the later-filed applications of the Schuylkill Broadcasting Company and the Pottsville News and Radio Corporation "it might very well be required at a later date, in consideration of the other two pending applications, to grant one of them notwithstanding that such a grant would preclude respondent from ever getting a station *license.*" This clearly indicates that, if it should grant respondent's application and issue a construction permit and, *during the construction of the station,* it should consider the two later applications and conclude that one appeared *better* qualified than respondent, the Commission would be required to grant the new application and thus preclude the respondent from ever obtaining a license to operate its constructed station!

After an applicant for radio facilities has been found duly qualified and an instrument of authorization issued to him because the proposed operation is found to be in the public interest, the matter of taking away any or all of those facilities and giving them to another party is not so simple a procedural process as petitioner's statement would indicate. In the first place, every application for a con-

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[1] A construction permit is only issued after the Commission has found that the operation of the proposed station will serve public interest, convenience and necessity. If the permittee proceeds to construct the station pursuant to the terms of the permit, there would appear to be no question but that the Commission is bound to issue the license to cover the permit unless it appears that false statements were originally made in the application, or in the hearing held thereon, which, had the truth been known at the time, would have resulted in a denial, rather than a grant, of the application, or unless it appears that circumstances have arisen since the grant to make the operation of the station *against* the public interest. See *Richmond Development Corporation* v. *Federal Radio Commission,* 35 F. (2d) 883.

struction permit requires the applicant to state whether or not he desires the facilities of any other station and, if he does so, to state specifically what those facilities are.[2] If he does not request the facilities of another station, but if his proposed operation would be inconsistent with that of an existing station, his application is designated for hearing and is considered in the light of the effect which it will have upon the operation of the existing station. Regardless of what the showing may be as to the merits of the new application, it is not a question of whether he can better serve the community, but merely whether the new applicant can do so without objectionable interference to the existing station. If he cannot, his application will be denied.

If the new applicant specifically requests the facilities of an existing station, the Commission will call upon that station to file an application for the renewal of its license,[3] even though the renewal would not normally be due for several months. When that application is received, the Commis-

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[2] The form supplied by the Commission for an application for a construction permit contains the following questions:

"20. (a) Does applicant request the assignment of all or any part of the facilities (i.e., frequency, power, and/or hours of operation) now assigned to any other station or stations .....
(Yes or No)

(b) If so, specify the station or stations and state accurately the facilities requested to be withdrawn therefrom ....."

[3] This practice is reflected in Section 1.362 of the Commission's Rules of Practice and Procedure:

"Sec. 1.362. *Filing directed by Commission.* Whenever the Commission regards an application for a renewal of license as essential to the proper conduct of a hearing or investigation, and specifically directs that it be filed by a date certain, such application shall be filed within the time thus specified. If the licensee fails to file such application within the prescribed time, the hearing or investigation shall proceed as if such renewal application had been received."

sion will designate it for hearing to be held at the same time as the application for its facilities. The applicant for the facilities has the burden of proving that it will be in the public interest (1) to delete the existing station and (2) to establish his station.

The Schuylkill and Pottsville News applications request the same facilities as does the respondent's application and, being for the same place, all three are mutually exclusive. But the last two do not request the facilities of the respondent because the latter has not been assigned any facilities. The question of whether it would be in the public interest to take away facilities from the respondent is not in issue, and it was not in issue at the time the hearing was held upon the Schuylkill and Pottsville News applications.

If facilities be granted respondent, the question of whether they should be taken away can readily be brought in issue by any applicant who specifically seeks them. However, any such applicant would have the burden of proving that the respondent is not operating in the public interest and that the applicant would so operate, *not merely that the applicant is better qualified in some respect.* If the latter were true, every station, regardless of a fine record of public service and compliance with the statute and the regulations of the Commission, would be open to attack by any party who thought he had a *better* idea for the operation of the same facilities in the public interest. And the Commission, in the exercise of the practically unfettered discretion which a comparative consideration is claimed to afford, would be in a position to take from one and give to another as its fancy might dictate.

It is true that, if the respondent should receive a grant, the Commission might later endeavor to revoke it entirely or modify the terms thereof even though no party were seeking the facilities. However, such proceedings would be controlled by the provisions of Section 312 of the Communications Act, and the respondent would have full op-

portunity to be heard and defend itself.[4] But in a revocation proceeding the Commission has the burden of proof.

The Commission might also, conceivably, if the respondent should receive a grant, later seek to refuse to renew the license and thus eliminate the station. However, such proceedings would be controlled by the provisions of Sec-

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[4] Sec. 312 (47 U. S. C. § 312, 48 Stat. 1068) provides:

"(a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however*, That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

"(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however*, That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

tion 309 (a) of the Communications Act, and the respondent would be afforded an opportunity to be heard.[5]

In brief, if the Commission should issue a permit to respondent, it could not later take away the facilities and give them to another without a hearing, held according to the requirements of due process, for the purpose of determining whether such action would be proper.

Point 2. The Applicant Who, Under the Commission's Rules, Becomes Entitled to Be Heard First and Who Proceeds to Meet the Statutory Requirements is Entitled to a Grant Without Waiting for Later Applicants to be Heard and Considered.

The petitioner proceeds upon the erroneous theory that it is required to grant the application which will *best* serve the public interest, and in order to do so it must wait and consider all applications regardless of when they may be filed, apparently on the assumption that the last applicant will be the best.

It is asserted by counsel for petitioner (Brief 46-47) that—

> " . . . Section 319 (a) very plainly requires that the Commission grant a construction permit to the best qualified applicant, not to the first to file his application with the Commission. The licensing provisions of the Act are designed to secure the best use of

[5] Sec. 309 (a) (47 U. S. C. § 309, 48 Stat. 1085) provides:

> "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

> the limited broadcasting facilities which are available and not to reward the victor in a race of diligence."

But Section 319 (a), which appears in full in petitioner's brief (p. 62), contains no such requirement. It merely provides, insofar as pertinent here, that no license shall be issued by the Commission unless a construction permit has first been granted, and that the Commission "may grant such permit if public convenience, interest, or necessity will be served by the construction of the station." That this power is not unlimited, as the contention of petitioner indicates, has been recognized by this Court in *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Company*, 289 U. S. 266, 285:

> "In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. . . . "

No one will contend that an applicant who is *not* qualified should be granted a license merely because he is the first. But if an applicant is in every way qualified and has attained priority of hearing and decision under the Commission's rules of procedure so that his application may be granted before any other could qualify under due process of law, it cannot be supposed that it was in contemplation of the statute that service to the public should be delayed on a vague supposition that a later applicant might serve better or best. And it cannot be concluded that the Commission has discretion, in derogation of its Rules of Practice, to indulge such a supposition whenever and as often as it may choose, thereby indefinitely delaying essential service to the public. There must be some limitation on the exercise of arbitrary discretion. The Communications Act itself recognizes this fact in Section 307 (a) which provides that—

> "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limita-

tions of this chapter, *shall grant* to any applicant therefor a station license provided for by this chapter." (Emphasis supplied.)

The mandatory nature of this provision was noted by the Court below in *Courier Post Publishing Company* v. *Commission*, 104 F. (2d) 213, 218:

> " . . . The permit should be granted if it meets the statutory criterion of public convenience, interest or necessity, if not, it should be denied. . . . "

Similarly, in *Heitmeyer* v. *Commission*, 95 F. (2d) 91, 100, the Court below stated:

> "The discretion which the Commission is directed to exercise is not absolute. The purpose of the statute is to secure to the people of the several states and communities a fair, efficient and equitable distribution of radio service. The Commission is directed by the Statute to apply this standard in considering applications for licenses 'when and insofar as there is demand for the same' [Sec. 307 (b)]; and, 'if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license . . . ' [Sec. 307 (a)]."

Even the Commission recognized a limitation upon its discretion by the promulgation of Rule 106.4,[8] which itself precluded consideration, on a comparative basis, of conflicting applications filed after the first application had been designated for hearing, as in the case at bar. This rule clearly contemplates, and sensibly so in conformity

[8] Commission Rule 106.4 provides:

> "In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, *excepting, however, applications filed after any such application has been designated for hearing.*" (Emphasis supplied.)

with the provisions of the statute, that the applicant who is thereunder entitled to be heard first is also entitled to a grant if he meets the statutory criterion of public convenience, interest, or necessity. Having duly promulgated such a rule it is elemental that the Commission may not depart therefrom to suit its fancy. Nevertheless, it claims (Brief 16) that it may require different procedures in different cases, according as it may be impressed with "varying considerations". Acceptance of that view would make the administration of the Act so variable as to negative the possibility of applying any rule of law and would substantially vitiate the right of review. The adoption by the Commission of rules of practice is responsive to the requirements of the Act and it is necessary that these rules be followed not only that there may be orderly procedure and a "proper dispatch of business" but in order that the requirements of due process of law shall be complied with.

In *Rio Grande Irrigation & Colonization Co.* v. *Gildersleeve*, 174 U. S. 603, 609, the Court referred with approval to the following statement in *Thompson* v. *Hatch*, 3 Pick. 512:

> "A duly authorized rule of Court has the force of law, and is binding upon the Court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

And in *Weil* v. *Neary*, 278 U. S. 161, 169, the doctrine is reaffirmed and reference is made to other cases to the same effect.

If the Commission were charged with the nebulous duty of selecting the "best" qualified applicant, this would open a wide field for speculation and doubt. It could not decide until it has heard all possible applicants, actual and poten-

tial. There might always be another and still another applicant moving up to demand that he be heard before a final decision—and any one of these might be the "best". Infinite possibilities of hair-splitting and favoritism could be envisioned. And even assuming that the Commission would always be actuated by the highest motives and the strongest desire to serve the public interest, there might ensue incalculable delay in making available radio facilities. The Act nowhere imposes upon the Commission any such impossible ideal of perfection. If the applicant be qualified according to the common sense requirements set forth in Sections 307 (a) and 319 (a) the Commission must issue the instrument of authorization.

Neither Section 307 (a) nor 319 (a) use the word "best", but there is another provision of the Act which clearly indicates that Congress had in mind the element of time as a factor in determining what is best in the public interest. Section 4 (j) provides:

> "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

Presumably in response to this injunction of the statute the Commission adopted its rules of practice, and particularly aforesaid Rule 106.4 which, as applied by the Commission, barred a belated application from contemporaneous consideration with the first application. The Court of Appeals has considered this rule on various occasions, the most significant observation being contained in its decision in the case of *Colonial Broadcasters, Inc.* v. *Federal Communications Commission*, 105 F. (2d) 781, 783:

> "We have had occasion to notice the rule and approve it as in all respects consistent with the provisions of the Act, and we think its language is sufficiently clear to leave no room for interpretation. Generally speaking, in the respects with which we are concerned here, it means no more than that where two applications are filed for the same facilities and neither has

been designated for hearing, the applications will be consolidated and heard together; but where, by reason of previous filing, one of the applications has been designated for hearing, the applications will be heard in turn and not necessarily on a comparative basis. We are unable to see anything unfair in this provision of the rule. It seems to us to be logical, reasonable, and fair, as well as to promote orderly procedure. Nor do we think there is any inconsistency in adhering to the rule and yet permitting the later applicant to intervene in the proceedings on the first application to show proper cause, if he can, why it should not be granted. . . ."

It is to be observed that the rule does not give an absolute right to contemporaneous hearing of "conflicting claims". The exception, however, is absolute in cutting off from such contemporaneous consideration "applications filed after any such application has been designated for hearing." As to such belated applications, the Commission announces positively that it will make no "endeavor" to fix the same date for hearing.

Respondent's application was designated for hearing five weeks before the first of the two other applications was filed and it had been filed six weeks before it was designated. If the exception to Rule 106.4 had been waived in behalf of the first of the belated applications, it would have been arbitrary to refuse to waive it in behalf of the second one which was filed nearly seven months after respondent's application. Thus an endless chain of belated applications would be entitled to be heard, thereby postponing the first until the last had caught up, and indefinitely delaying service to the public. Can it be said that this would "best conduce to the proper dispatch of business and to the ends of justice"?

Under the well-recognized rules of procedure having the force and effect of law, and as required by due process, the Commission heard and reached a final determination in this case upon "a full statement in writing of the facts and grounds for its decision as found and given by it", in ac-

cordance with the requirements of Section 402 (c) of the Communications Act and as required by numerous decisions of this Court. *Florida* v. *U. S.*, 282 U. S. 194, 215, citing *Beaumont, S. L. & W. R. Co.* v. *U. S.*, 282 U. S. 74; also concurring opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38. In its decision, the Commission made findings of fact which were sufficient in every way to form a basis for the conclusion that a granting of the permit would serve public convenience, interest, or necessity. But the Commission denied the application because of error in respect of two questions of law. The Court below, having statutory power of review, so held, but out of an abundance of caution sent the case back to the Commission for reconsideration on one of those questions. Using that remand of the case as an excuse, the Commission now claims that it is necessary to conduct a hearing outside the record submitted to the Court and to consider other applications on a comparative basis. This, if permitted, would mean a complete abrogation of the rule promulgated by the Commission for the proper dispatch of business and necessarily would result in endless delay in providing radio facilities for the public.

The petitioner asserts (Brief 16) that "many considerations which vary from case to case must affect the procedural question of whether to consider pending conflicting applications separately or simultaneously." Several such considerations are specified, one being "the amount of delay that will result from a simultaneous comparative consideration."

If the Commission had been influenced at all by this consideration to speed the respondent's application to prompt hearing and decision for the purpose of making radio facilities more promptly available to the public, as contemplated by the Communications Act, the earlier separate hearing and decision on this application would be understandable. But the whole course of this proceeding shows clearly that what was intended from the first was a denial. The flimsy

grounds ultimately assigned by the Commission for such denial sufficiently evidences that fact.

It is shown (Petitioner's brief, p. 17) that in May, 1937, when the Commission had before it respondent's application "on which a hearing had been held and argument heard by the Commission," the subsequently filed applications "were not at that time ready for final Commission action." It is thus apparent that there were no "pending conflicting applications" and the Commission in effect so conceded when it refused a specific request from the first of these applicants for simultaneous comparative hearing with respondent's application, thereby adhering to its established rule (106.4). Nevertheless, the Commission states (Brief 17): "Since it appeared to the Commission that respondent's application should be denied, it acted at that time to deny the application and did not delay action for possible comparative consideration with the Schuylkill and Pottsville News and Radio applications."

The fact is, as we have already shown, the Commission could not give comparative consideration to these other applications without doing violence to its established rule having the force and effect of law. That being so, how does the judgment of the Court below invalidating the grounds assigned for the denial of respondent's application invest the Commission with jurisdiction or power to do what it refused to do and could not lawfully do when it had control of the case?

Our position is that when an application is filed and set for hearing and another subsequently filed application is too late to be heard concurrently under the Commission's rule and the Commission proceeds to a determination of the first application but bases its denial thereof on capricious and arbitrary grounds, the application being sound and in full compliance with the statute, the Commission cannot then in derogation of the established rule advance other reserve battalions of applications under the pretext that it is in search of the "best".

Point 3. The Commission May Not Oust the Jurisdiction of the Court Having Statutory Power of Review by Setting up, Subsequent to the Decision of the Court on Questions of Law, a New Procedure Involving a New Record, Other Issues and Other Parties.

The fundamental error which permeates the argument advanced by opposing counsel is the conception that, after the reviewing authority has taken jurisdiction, the Commission may deal with the case precisely as though nothing had supervened and that thereafter it may adopt whatever procedure it may choose in derogation of its own rules of procedure as applied by itself and followed by the Court.

As shown in our "Opposition to Petition for Writ of Certiorari" (pp. 17-18), the authority of the Commission "ended with the filing in Court of the transcript of record" and the Court acquired "continued and exclusive jurisdiction". *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 368, 372. Thereafter, the Commission without leave of the appellate court had no authority "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer," but is bound by the judgment as the law of the case and "cannot vary it, or examine it for any other purpose than execution, or give any other or further relief; or review it even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded . . . " *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247.

Petitioner contends (Brief 46) that this doctrine as announced in the cited cases is dicta because in those cases "the mandate of the appellate court disposed of the entire case". However, the doctrine has been announced without qualification in cases cited in the *Sanford Fork & Tool Co.* case, running back to 1838, and has been affirmed in recent cases, such as *Delaware, L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1, and *Baltimore & Ohio R. Co.* v. *U. S.*, 279 U. S. 781. The doctrine was recognized, in effect, in the

Ford Motor Co. case and other recent cases, as shown in our "Opposition" (pp. 16-19). The earliest expression of the doctrine by this Court seems to have been in *Sibbald* v. *United States*, 12 Pet. 488, 492, wherein reference is made to the same doctrine applied in the House of Lords (3 Dow. P. C. 157).

We confess that we have been unable to find the doctrine of strict compliance announced in any case where disobedience of the judgment of an appellate court has been so obviously attributable to contumacy. As stated in *Barber Asphalt Paving Co.* v. *Morris*, 132 F. 945, 954, "few, indeed, are the cases in which appellate jurisdiction is disregarded after the right to it has been actually exercised."

Here the judgment of the Court below in the first instance disposed of the entire case on the questions of law essential to its disposition. To borrow language used in the opinion of this Court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 136, the Court below found the Commission "to have proceeded on erroneous legal principles" and ordered it "to proceed within the framework of its own discretionary authority on the indicated correct principles."

The Court below conceded (R. 4) that the rule or policy to be prescribed or announced "on the question of the propriety of confining grants of a local nature to local people" was a matter "left wholly in the hands of the Commission" under the statute.[7] It reversed the Commission

[7] This was the secondary reason for the denial of respondent's application, namely, that the applicant was controlled by a non-resident who was not shown to be personally familiar with the needs of the area to be served. The Commission expressed the opinion that "local" stations should be controlled by persons who are familiar with the needs of the area to be served. (The facilities requested by the applicant are in the "regional", not "local", category.) When the Court of Appeals reversed the Commission and remanded the case, it left open for further consideration by the Commission the *sole question* of whether the latter had adopted, or intended forthwith to adopt, as a definite policy the disqualification of corporate applicants which may be controlled by non-residents of

on the primary ground assigned for its denial of the application, *i.e.*, the Commission's erroneous view of the Pennsylvania Securities Act, and sent the case back for reconsideration on the secondary ground because the decision resting on that ground was in conflict with the Commission's decisions in all other cases, and was therefore to be regarded as arbitrary and capricious.

The Commission had fully performed and exercised its administrative duties when the case was before it. When the case reached the Court the latter acquired complete jurisdiction to decide the questions of law involved. Instead of announcing a final decision on one of these questions it sent it back to the Commission for reconsideration on the complete record submitted to the Court. There has never been any suggestion from the Commission that it desired to supplement that record; but without leave of the Court it arbitrarily sought to bring in another record with other issues and other parties, making an entirely new case.

If judicial review is to be other than a mockery, how can it be said that such a proceeding by the Commission is to be considered "within the framework of its own discretionary authority on the indicated correct principles"? And how can it be said that the doctrine announced by this Court in the long line of cases beginning with the *Sibbald* case in 1838 is to be regarded as dicta? The doctrine is founded in principles so essential to the proper administration of the law, and "to a reasonable termination of litigation" (*Re Potts*, 166 U. S. 263, 267) that it is not logical to assume that it does not apply in a case such as is presented here.

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the area to be served. (R. 4, 25, 28.) The Commission has never adopted any such policy. As a matter of fact, on November 24, 1939, it specifically held that a finding that a corporate applicant for a local station is controlled by non-residents who are not shown to be familiar with the needs of the area to be served would not alter the Commission's conclusion that the applicant is qualified and that public interest, convenience and necessity would be served by granting the application. (*Vincennes Newspapers, Inc.*, Docket No. 4087.)

Point 4. The United States Court of Appeals for the District of Columbia and Other Federal Courts Have Power to Issue All Writs "Which May Be Necessary for the Exercise of Their Respective Jurisdictions, and Agreeable to the Usages and Principles of Law."

Section 1, Article III, of the Constitution provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . "[8]

The Code of Law of the District of Columbia provides (Title 18, Sec. 1) that the judicial power of the District shall be vested in:

. . .

> "Second. Superior Courts, namely, the Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia, and the Supreme Court of the United States . . . "

Section 33 of the District Code (Title 18) specifically provides:

> "The said Court of Appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction."

We do not need to depend entirely upon this express grant of power in aid of the appellate jurisdiction of the Court below nor the reason that mandamus is a writ in execution of the judgment of the Court already rendered (*Heine* v. *Board of Levee Commissioners*, 86 U. S. 223), and it has been repeatedly held that "Section 716, Rev. Stat. (Sec. 262 of the Judicial Code, U. S. C. Title 28, Sec. 377), provides that this Court and other federal courts

[8] The United States Court of Appeals for the District of Columbia is a constitutional court of the United States and capable of receiving judicial power under Article III. *O'Donoghue* v. *United States*, 289 U. S. 516.

'shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.' " *Ex Parte United States*, 287 U. S. 241, 246.

In the case just cited this Court said (287 U. S. 246):

> " . . . McClellan v. Carland, 217 U. S. 268, 280, 54 L. ed. 762, 766, 30 S. Ct. 501, laid down the general rule applicable both to this court and to the circuit courts of appeals, that the power to issue the writ under Rev. Stat. Sec. 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.' See also Delaware, L. & W. R. Co. v. Rellstab, 276 U. S. 1, 5, 72 L. ed. 439, 441, 48 S. Ct. 203; Re Babcock (C. C. A. 7th) 26 F. (2d) 153, 155; Barber Asphalt Paving Co. v. Morris (C. C.) 67 L. R. A. 761, 66 C. C. A. 55, 132 Fed. 945, 952-956."

Nor is it necessary to answer petitioner's highly technical argument based on an analysis of *Kendall* v. *United States*, 12 Pet. 524, against the jurisdiction of the Court below to issue mandamus in this case on the ground that this is not an appeal but a case of original jurisdiction in respect of which no express authority has been granted the Court below to issue mandamus.

It is not even necessary to make the abstract argument suggested by language employed in the *Kendall* case, *supra*, p. 624, that it would "involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist."

It is only necessary to show that Sec. 402 (b) of the Communications Act is meticulously exact in designating as an "appeal" the proceeding on review in the Court of Ap-

peals pertaining to the granting or refusing of permits or licenses for radio stations by the Commission.

It will be observed that Sec. 402 (a) provides that—

> "The provisions of the Act of Oct. 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act."

Under the provisions of the said Act of October 22, 1913, (Sec. 41) "The district courts shall have original jurisdiction" of "orders" included within the provision above quoted. The "venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order . . . shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made," etc. (Sec. 43); and under Sec. 45a "communities, associations, corporations, firms, and individuals who are interested in the controversy or question" before the Commission may intervene in said suit or proceedings at any time after the institution thereof.

It is therefore apparent that the "orders" contemplated under paragraph (a) of Sec. 402 of the Communications Act are those coming within the class of administrative orders imposing general requirements or regulations, such as have been considered by this Court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, and *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232. In the *Rochester* case the effect of the order was to bring the Telephone Corporation under "previously formulated mandatory orders addressed generally to all carriers amenable to the

Commission's authority" (p. 144). In the *American Telephone & Telegraph Co.* case the order involved was one "prescribing a uniform system of accounts for telephone companies subject to the Communications Act of 1934." As stated by the Court (p. 237):

> "The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the Corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the Act that it may properly regulate such matters as are really within its jurisdiction."

It is readily apparent that these were strictly administrative orders as to which it was said in the case last cited (p. 236):

> "This Court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers."

Coming to consider the subject matter of Sec. 402 (b) we find entirely different language employed with an obvious intent to draw a distinct line of demarkation. Thus:

> "(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:
>
> "(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for a renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.
>
> "(2) By any person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.
>
> "(3) By any radio operator whose license has been suspended by the Commission."

These provisions deal, not with orders applying to a general class and involving strictly administrative functions by the Commission, but with "decisions" to be formulated after hearings in accordance with the requirements of due process of law because such "decisions" constitute a final determination by the Commission of the rights of parties directly affected. In reaching such "decisions" the Commission acts in a quasi-judicial capacity and its findings of fact and conclusions of law constitute a case or controversy. Therefore when such a case goes to the Court of Appeals it is "an appeal" not only by definition of the Act but it is so in practical effect.

We think it is entirely clear from what has been said that the power conferred upon the Court of Appeals by Section 33 of the District Code "to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction" is ample, without more, to empower that Court to issue a writ of mandamus in this case.

Point 5. The Court of Appeals, Having Jurisdiction of Questions of Law on Which the Commission is Challenged, Has the Same Power to Issue Mandamus to Protect Its Jurisdiction in this Case as it Does in Cases on Appeal from the District Court.

The Court below stated (R. 27) that they had "no doubt that as far as is practicable the order of the court entered on an appeal from the Commission ought to have the same effect and be governed by the same rules as apply in appeals from a lower federal court to an appellate federal court in an equity proceeding." (Citing *Sanford Fork & Tool Co., Petitioner; Re Potts;* and *D. L. & W. R. Co.* v. *Rellstab,* all *supra.*)

The Commission earnestly argues (Brief 44) that, "in entertaining a proceeding under Section 402, the position of the Court below is no way comparable to that when it hears an appeal from the District Court," and that "even if the writ of mandamus had been appropriate if issued to the District Court, the Court below was entirely without

warrant in its assumption that it possessed an analogous supervisory power over the administrative functions of the Commission."

This argument is based on the erroneous hypothesis that the Court below has asserted authority to supervise or direct the administrative functions of the Commission. As is elsewhere shown, the Court has scrupulously avoided any such thing.

The Commission had performed all necessary administrative functions before it rendered a decision in this case. It had taken evidence, made findings of fact, heard oral argument, and formally stated the grounds for its decision in writing, as required by law. That was the end of its administrative functions in this case. No question was raised as to the completeness of the record when the Court below acquired exclusive jurisdiction on appeal. It is conceded that the Court had jurisdiction to pass on the questions of law put in issue by that appeal. It is conceded also that the Commission had committed errors of law, and it is even insisted that the Commission intends to respect and carry out the judgment of the Court.

The point of departure is reached when we come to the procedure proposed by the Commission to comply with the Court's judgment. According to the decision of the Court upon the petition for writs of prohibition and mandamus, that proposed procedure was not such as might lawfully be followed in this case because it involved an entirely new case on another record with new parties and extraneous issues.

In order to prevent the defeat or impairment of its jurisdiction the Court signified its intention of issuing mandamus to compel the Commission to carry out the judgment by reconsidering the one question left open for its determination on the record made and which alone constituted the basis for the decision of the Court as well as that of the Commission. Obviously, if another record were to be imported a new case would be called into being.

It therefore seems perfectly clear that in doing what it did the Court did not invade the administrative province of the Commission incident to this case. It merely prevented the Commission from straying off into another field, thereby delaying the performance of the duty imposed upon it by the Act as properly construed by judicial authority.

Since the Court has no jurisdiction to pass on other than questions of law coming before it on a petition for review of the Commission's decision, and since it is conceded that the original decision of the Court did nothing more, the conclusion would seem to be irresistible that the Court was clothed with the identical authority and was as much in duty bound to protect its jurisdiction to see that its judgment should be carried into effect as though a decision of a lower court had been involved.

In the *Ford Motor Co.* case, which involved another administrative agency operating under an act as to which counsel concede (Brief 27) that the provisions governing review are substantially similar to those in the Communications Act, this Court held (305 U. S. 371) that the appellate court—

> "... was possessed of exclusive jurisdiction of the administrative proceeding 'and of the question determined therein,' and thus of the power of 'enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.'"

And further that—

> "... the Board, in the presence of the Court's continued and exclusive jurisdiction, remained without authority to deal with its order ..."

We are confronted with the argument (Brief 44), differentiating between the power to be exercised by the appellate court in reviewing decisions of a lower court and its power to review "the Commission's action in the performance of its executive or administrative function," that, as to the

former, "the appellate court acts on a record containing all the circumstances before the trial Court," whereas in reviewing Commission's action "it may be supposed not to have the expert assistance which must lie back of the Commission's decision on the many factors not presented to the Court; and, certainly in the case where a record involving only one of conflicting applications is before it, the Court has only a fragmentary part of the record which must ultimately guide the grant of one application."

But the Court is entitled to have *all* factors presented to it! The Communications Act, Sec. 402 (c), expressly provides:

> ". . . Within thirty days after the filing of said appeal the Commission shall file with the Court the originals or certified copies of *all papers or evidence* presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter, file a *full statement* in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal." (Emphasis supplied.)

Not only does the Act forbid Star Chamber proceedings but this Court has repeatedly held that the fundamental requirements of due process are violated when an administrative agency acts upon information or "factors" not properly introduced in evidence or without due notice to interested parties. In *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, this Court, in an opinion by Mr. Justice Brandeis dealing with an order of the Interstate Commerce Commission, said:

> ". . . The general notice that the Commission would rely upon the voluminous annual report is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."

And in *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, the Court held:

> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. *And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat.* Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." (Emphasis supplied.)

The pretension that the Commission is entitled to decide cases on its peculiarly "expert" knowledge or "on the many factors not presented to the Court" makes especially apt the following expression of this Court in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38:

> ". . . Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. . . ."

Point 6. The Respondent Exhausted Its Administrative Remedy Before Resorting to the Court Below, and It Has No Plain, Speedy and Adequate Remedy at Law.

As already shown, the fundamental misconception indulged by opposing counsel is that the Commission may elect to treat the case when remanded just as if there had been no interruption or supersedure of its control and no requirement by the Court that reconsideration should be confined to the one question remanded without going outside the record already made. But for this misconception we are convinced that there would have been no citations such as *Federal Power Comm.* v. *Metropolitan Edison Co.*, 304 U. S. 375, and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. No final order had been made by the administrative agency in either of those cases. As this Court said in the *Metropolitan Edison Co.* case, "There was no order of the Commission before the Circuit Court of Appeals for review", hence "the Circuit Court of Appeals in the circumstances disclosed had no appellate jurisdiction to protect". As pointed out in that opinion:

> ". . . The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."

This Court therefore reversed the decree of the Circuit Court of Appeals granting an injunction against the Commission's order providing for an inquiry and investigation. As one ground for such reversal it was observed that—

> "Attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration."

The instant case involves a very different question. Here, as is elsewhere shown, we are dealing with a *final* decision and order of the Communications Commission made on a complete record and with full findings of fact and a statement of the grounds for its decision. The administrative remedy had been exhausted when the petition for review was filed with the Court below and no question was raised then as to the jurisdiction of the Court to pass on the questions of law involved. The Court therefore acquired exclusive jurisdiction and reversed the Commission on the record made. Under the statute, that record is binding on Court and Commission. The Commission cannot alter that fact by attempting to embark on a new proceeding and pretending that thereby it affords an administrative remedy which respondent has not exhausted.

Manifestly, in such case the appeal provisions of the Communications Act afford no adequate remedy at law, for under the procedure contemplated by the Commission respondent might be required to appeal again and again until the Commission had exhausted reasons however frivolous for denying the application. Certainly any "final relief" to be secured by repeated appeals might be so far beyond the reach of the average applicant as to be no relief at all. Thus the very situation in which respondent now finds itself strikingly illustrates the need for the issuance of the writ of mandamus by the Court below. Without it the respondent has no remedy.

The Court has stated that the mere fact that there is a remedy at law is not enough; that remedy "must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce's Executors* v. *Grundy*, 5 Pet. 210, 215; *City of Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 12.

CONCLUSION.

The proceeding in the Court of Appeals upon the petition for writs of prohibition and mandamus was part and parcel of the case originally brought before the Court by the appeal. Issuance of the mandamus was ancillary to the original judgment, the correctness of which is not in issue, and mandamus was necessary for the protection of the jurisdiction of the Court and constituted merely a continuing exercise of jurisdiction which the Court possessed from the outset and never relinquished. Unless the action of the Court below in enforcing its original judgment is sustained, that judgment, now conceded to have been correct, will be rendered nugatory.

Respectfully submitted,

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January, 1940.

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SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1939.

Federal Communications Commission, Petitioner, *vs.* The Pottsville Broadcasting Company. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 29, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The court below issued a writ of mandamus against the Federal Communications Commission, and, because important issues of administrative law are involved, we brought the case here. 308 U. S. —. We are called upon to ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of radio broadcasting in the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U. S. C. § 151.

Adequate appreciation of the facts presently to be summarized requires that they be set in their legislative framework. In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927, c. 169, 44 Stat. 1162, as amended, 46 Stat. 844. By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry.[1] The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927.

Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might

[1] For the legislative history of the Act of 1927, see H. Rep. No. 464, S. Rep. No. 772, 69th Cong., 1st Sess.; 67 Cong. Rec. 5473-5504, 5555-86; 5645-47; 12335-59; 12480, 12497-12508, 12614-18; 68 Cong. Rec. 2556-80, 2750-51, 2869-82, 3025-39, 3117-34, 3257-62, 3329-36, 3569-71, 4109-53. A summary of the operation of previous regulatory laws may be found in Herring and Gross, Telecommunications, pp. 239-45.

be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. Communications Act of 1934, Title iii, § 307(d). No license was to be "construed to create any right, beyond the terms, conditions, and periods of the license." *Ibid.* § 301. In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, "public convenience, interest, or necessity" was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest. *Ibid.*, Title I, § 4(j). Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors. Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of "public convenience, interest, or necessity." The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.[2]

[2] Since the beginning of regulation under the Act of 1927 comparative considerations have governed the application of standards of "public convenience, interest, or necessity" laid down by the law. " . . . the commission desires to point out that the test—'public interest, convenience, or necessity'—becomes a matter of a comparative and not an absolute standard when applied to broad-

Against this background the facts of the present case fall into proper perspective. In May, 1936, The Pottsville Broadcasting Company, respondent here, sought from the Commission a permit under § 319 *Ibid.*, Title iii, for the construction of a broadcasting station at Pottsville, Pennsylvania. The Commission denied this application on two grounds: (1) that the respondent was financially disqualified; and (2) that the applicant did not sufficiently represent local interests in the community which the proposed station was to serve. From this denial of its application respondent appealed to the court below. That tribunal withheld judgment on the second ground of the Commission's decision, for it did not deem this to have controlled the Commission's judgment. But, finding the Commission's conclusion regarding the respondent's lack of financial qualification to have been based on an erroneous understanding of Pennsylvania law, the Court of Appeals reversed the decision and ordered the "cause . . . remanded to the . . . Communications Commission for reconsideration in accordance with the views expressed." *Pottsville Broadcasting Co.* v. *Federal Communications Commission*, 98 F. (2d) 288.

Following this remand, respondent petitioned the Commission to grant its original application. Instead of doing so, the Commission set for argument respondent's application along with two rival applications for the same facilities. The latter applications had been filed subsequently to that of respondent and hearings had been held on them by the Commission in a consolidated proceeding, but they were still undisposed of when the respondent's case returned to the Commission. With three applications for the same facilities thus before it, and the facts regarding each having theretofore been explored by appropriate procedure, the Commission directed that all three be set down for argument before it to determine which, "on a comparative basis" "in the judgment of the Commission will best serve public interest." At this stage of the proceedings, respondents sought and obtained from the Court of Appeals the writ

casting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser." Second Annual Report, Federal Radio Commission, 1928, pp. 169-70.

of mandamus now under review. That writ commanded the Commission to set aside its order designating respondent's application "for hearing on a comparative basis" with the other two, and "to hear and reconsider the application" of The Pottsville Broadcasting Company "on the basis of the record as originally made and in accordance with the opinions" of the Court of Appeals in the original review (98 F. (2d) 288), and in the mandamus proceedings. *Pottsville Broadcasting Co.* v. *Federal Communications Commission*, 105 F. (2d) 36.

The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. See *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 255-56. That proposition is indisputable, but it does not tell us which issues are laid at rest. Cf. *Sprague* v. *Ticonic Bank*, 307 U. S. 161. Nor is a court's interpretation of the scope of its own mandate necessarily conclusive. To be sure the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes. But it is not even true that a lower court's interpretation of its mandate is controlling here. Cf. *United States* v. *Morgan*, 307 U. S. 183. Therefore, we would not be foreclosed by the interpretation which the Court of Appeals gave to its mandate, even if it had been directed to a lower court.

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of

their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those.[3] To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable was a quarter century ago the opinion of eminent spokesmen of the law.[4] Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judical judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services.[5] These differences in origin and function preclude

[3] See Maitland, The Constitutional History of England, pp. 415-18; Landis, The Administrative Process, *passim*.

[4] See, for instance, the address of Elihu Root as President of the American Bar Association:

"There is one special field of law-development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. . . . There will be no withdrawal from these experiments. . . . We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." 41 A. B. A. Rep. 355, 368-69.

[5] See United States v. Lowden, *ante*, p. —, decided December 4, 1939; Herring, Public Administration and the Public Interest, *passim*.

wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, "should not be too narrowly constrained by technical rules as to the admissibility of proof," *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.[6] Compare *New England Divisions Case*, 261 U. S. 184. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.

Under the Radio Act of 1927 as originally passed, the Court of Appeals was authorized in reviewing action of the Radio Commission to "alter or revise the decision appealed from and enter such judgment as to it may seem just." § 16 of the Radio Act of 1927, 44 Stat. 1169. Thereby the Court of Appeals was constituted "a superior and revising agency in the same field" as that in which the Radio Commission acted. *Radio Comm.* v. *General Electric Co.*, 281 U. S. 464, 467. Since the power thus given was administrative rather than judicial, the appellate jurisdiction of this Court

[6] The Communications Commission's Rules of Practice, Rule 106.4, provided that "the Commission will, so far as practicable, endeavor to fix the same date . . . for hearing on all applications which . . . present conflicting claims . . . excepting, however, applications filed after any such application has been designated for hearing." Respondent contends, and the court below seemed to believe that this rule bound the Commission to give respondent a non-comparative consideration because its application had been set down for hearing before the later and rival applications were filed. The Commission interprets this rule simply as governing the order in which applications shall be heard, and not touching upon the order in which they shall be acted upon or the manner in which they shall be considered. That interpretation is binding upon the courts. A. T. & T. Co. v. United States, 299 U. S. 232.

could not be invoked. *Radio Comm.* v. *General Electric Co.*, supra. To lay the basis for review here, Congress amended §16 so as to terminate the administrative oversight of the Court of Appeals. c. 788, 46 Stat. 844. In "sharp contrast with the previous grant of authority" the court was restricted to a purely judicial review. "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision." *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 276.

On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. *Fed. Power Comm'n* v. *Pacific Co.*, 307 U. S. 156. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Cf. *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364.

The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of "public convenience, interest, or necessity." The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of adinistrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation,

rather than the public interest, would be decisive factors in determining which of several pending applications was to be granted.

It is, however, urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267, 270. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process.

The judgment is reversed, with directions to dissolve the writ of mandamus and to dismiss respondent's petition.

Reversed.

Mr. Justice McReynolds concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.